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# No. 16 Original.

## Supreme Court of the United States.

OCTOBER TERM, 1906.

ORIGINAL.

Office Supreme Court, U. S.
FILED.
MAR 27 1907
JAMES H. McKENNEY,
CLERK.

IN THE MATTER

*of*

THE APPLICATION OF JAMES POLLITZ FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE E. HENRY LACOMBE, CIRCUIT JUDGE OF THE UNITED STATES FOR THE SECOND CIRCUIT, AND AGAINST THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

## PETITION FOR MANDAMUS AND MOTION FOR LEAVE TO FILE THE SAME, AND FOR RULE.

ROGER FOSTER,
*Of Counsel for Petitioner,*
35 Wall Street,
New York.

IN THE

# Supreme Court of the United States. 1

IN THE MATTER

OF

The Application of JAMES POLLITZ for a Writ of Mandamus against the Honorable E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit, and against the Circuit Court of the United States for the Southern District of New York. 2

And now comes the petitioner, James Pollitz, by Roger Foster, his attorney and counsel; and he moves for leave to file the petition for a writ of mandamus, hereto annexed; and he further moves that a rule be entered and issue directing the Honorable E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit and for 3 the Southern District of New York, and directing the Circuit Court of the United States for the Southern District of New York to show cause why a writ of mandamus should not issue against them and each of them in accordance with the prayer of the said petition, and why said petitioner should not have such other and further relief in the premises as may be just and meet.

ROGER FOSTER,
Attorney and Counsel for Petitioner James Pollitz.

4 TO THE HONORABLE MELVILLE W. FULLER, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of JAMES POLLITZ, a citizen and resident of the City, County and State of New York, respectfully shows:

I.—Heretofore and on or about January 15, 1907, your petitioner duly began an action in the Supreme Court of the State of New York, in which action your petitioner was plaintiff and the following persons were defendants: The Wabash Railroad Company, a consolidated corporation organized and ex-
5 isting under the laws of the States of Missouri, Ohio, Indiana, Michigan and Illinois, respectively, which then was and still is a citizen of each of said States; The Mercantile Trust Company, The United States Mortgage and Trust Company, The Metropolitan Trust Company of the City of New York, and the Bowling Green Trust Company, each of which trust companies then was and still is a corporation organized and existing under the laws of the State of New York, with its office and place of business in the City and County of New York, and a citizen of said County and State of New York, Edgar T. Welles, Robert C. Clowry, Winslow S. Pierce, Rob-
6 ert M. Gallaway, Thomas H. Hubbard, John T. Terry, John C. Otteson, Henry Evans, Henry K. Pomroy and George M. Cumming, each of whom then was and still is a citizen of the State of New York, George J. Gould, who, upon information and belief, then was and still is a citizen of the State of New Jersey; James B. Forgan, Frederick A. Delano and Edward T. Jeffery, who, upon information and belief, then were and still are citizens of the State of Illinois; and J. C. Van Blarcom who then was and still is a citizen of the State of Missouri. Said action was then begun by a service of a summons and complaint on the defendants Wabash Railroad Com-

pany, Jeffery, Otteson, Pierce, Mercantile Trust 7
Co., United States Mortgage and Trust Company, Evans, Pomroy, Cumming, Bowling Green Trust Company, Metropolitan Trust Company of the City of New York. None of the other defendants have been served nor have any of them appeared. A copy of the summons and complaint herein is hereto annexed, marked A and B respectively.

II.—On or about the 25th day of January, 1907, the said defendant, the Wabash Railroad Company, filed in the office of the Clerk of the County of New York, a petition praying for a removal of said action to the Circuit Court of the United States for the Southern District of New York, for the alleged rea- 8
son that a separable controversy existed therein between this plaintiff and said Wabash Railroad Company, a copy of which petition is hereunto annexed marked C; and said railroad company at the same time filed a bond in support of said petition, a copy of which bond is hereunto annexed marked D.

A transcript of the record of said suit was duly filed in the office of the Clerk of the Circuit Court of the United States for the Southern District of New York on or about February 4, 1907. Said transcript consisted of copies of the said summons, complaint, petition for removal, bond, and a certificate of what purported to be the approval of said bond by a Justice of the Supreme Court of the State 9
of New York.

III.—Subsequently and on or about February 15, 1907, your petitioner duly moved at a Stated Term of said Circuit Court of the United States for the Southern District of New York for an order remanding said cause to the said State Court. The motion papers then submitted to said Court consisted, besides said transcript, of a notice of said motion, a copy of which is hereunto annexed marked E., and annexed to said notice of motion, and the affidavit of this plaintiff, sworn to February 6, 1907,

10 of which affidavit a copy is hereunto annexed marked F. Said motion was heard by the Honorable E. Henry Lacombe, Circuit Judge of the United States, duly appointed in and for the Second Circuit; and subsequently, on or about the 18th day of February, 1907, he handed down an opinion, stating that said motion to remand was denied, a copy of which opinion is hereunto annexed marked G. Subsequently, an order denying said motion was signed by said Judge Lacombe and filed in the Clerk's office of said United States Circuit Court on or about February, 21, 1907. A copy of said order denying said motion is hereunto annexed marked H.

11 IV.—Your petitioner is informed by his counsel, learned in the law, and he believes that the said Circuit Judge of the United States erred in denying said motion, and that said cause should have been remanded and should be remanded to said State Court, for the reason that the said Circuit Court of the United States for the Southern District of New York had and has no jurisdiction of the same, since the parties to the controversy in said suit were not and are not citizens of different States, and since there was and is no separable controversy between this plaintiff and the said Wabash Railroad Company, and for other reasons.

Wherefore your petitioner prays: that a rule be
12 made and issue from this Honorable Court, directing the said Honorable E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit, and directing the said Circuit Court of the United States for the Southern District of New York to show cause why a writ of mandamus should not issue commanding the said Judge and the said Court and each of them to remand said action to the Supreme Court of the State of New York, in and for the County of New York, and to desist from retaining jurisdiction in said action, and to desist from exercising any further jurisdiction in said action, except the entry of an order remanding

the said action, with costs; or, in the alternative, 13
for such other and further relief as to this Honorable Court may seem just and meet, and your petitioner will ever pray, &c.

JAMES POLLITZ.

NEW YORK, March 11, 1907.

ROGER FOSTER,
Attorney for Petitioner,
35 Wall Street,
New York.

ROGER FOSTER,
Of Counsel.

STATE OF NEW YORK,
County of New York,
Southern District of New York, } ss.: 14

JAMES POLLITZ, being duly sworn, deposes and says: I am the petitioner above named. The foregoing petition is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe the same to be true.

JAMES POLLITZ.

Sworn to before me this
11th day of March, 1907.

[NOTARIAL SEAL.]

John J. O'Reilly
~~Notary Public,~~
~~New York County.~~
NOTARY PUBLIC, KINGS COUNTY, 15
Certificate filed in New York County.

16 **A.**

SUPREME COURT OF THE STATE OF NEW YORK.

COUNTY OF NEW YORK.

JAMES POLLITZ,
Plaintiff,

vs.

17 THE WABASH RAILROAD COMPANY, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, John C. Otteson, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, George J. Gould, Winslow S. Pierce, John T. Terry, Joseph J. Slocum, Mercantile Trust Company, United States Mortgage and Trust Company, Henry Evans, Henry K. Pomroy, George M. Cumming, The
18 Bowling Green Trust Company, J. C. Van Blarcom, James B. Forgan and The Metropolitan Trust Company of the City of New York,
Defendants.

Summons.

TO THE ABOVE NAMED DEFENDANTS:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your

answer on the plaintiff's attorney within twenty days after service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, January 15th, 1907.

STEPHEN M. YEAMAN,
Plaintiff's Attorney.
Office and P. O. address,
15 William Street,
Borough of Manhattan.
New York City.

22 **B.**

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

JAMES POLLITZ,
Plaintiff,

vs.

23 THE WABASH RAILROAD COMPANY, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, John C. Otteson, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, George J. Gould, Winslow S. Pierce, John T. Terry, Joseph J. Slocum, Mercantile Trust Company, United States Mortgage and Trust Company, Henry Evans, Henry K. Pomroy, George M. Cumming, The Bowling Green Trust Company, J. C. Van Blarcom, James B. Forgan and The Metropolitan Trust Company of the City of New York,
Defendants.

} Complaint.

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The plaintiff, suing in his own behalf, and in behalf of all stockholders of The Wabash Railroad Company similarly situated, complains of the above named defendants, and for cause of action alleges:

FIRST.—That the plaintiff is a citizen of the State of New York, and that the defendant The Wabash Railroad Company is, and at all the times hereinafter referred to was, a foreign consolidated corporation, duly organized and existing under the laws of the States of Missouri, Ohio, Indiana, Michigan and Illinois respectively, and at all of said times did, and now does, own and operate an extensive system of railways in all of said States. Said consolidated corporation was formed by a consolidation of the Wabash Western Railway Company, which was a foreign corporation organized under the laws of the State of Missouri in or about the month of March, 1887, and the Wabash Railway Company, which was a foreign corporation organized under the laws of the States of Ohio, Indiana and Illinois in or about the month of May, 1889, and the said consolidation was completed and carried into effect in or about the month of July, 1889. That the said defendant Wabash Railroad Company as so consolidated, remains and continues to be a corporation under the laws of each of said States, and subject to the laws thereof, as were its constituent companies, and by operation and intendment of law is a citizen of each of the States under which such constituent companies were respectively originally incorporated, and upon information and belief the plaintiff says that it has never ceased to be a corporation of, and subject to the laws of each of the said States respectively.

SECOND.—The above named defendants Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, Robert C. Clowry, George J. Gould, Winslow S. Pierce, Robert M. Gallaway, Thomas H. Hubbard and John T. Terry now are, and since the commencement of the year 1906 have been, directors of, and now constitute, and during said time have constituted, a majority of the Board of Directors of the said defendant The Wabash Railroad Company, and the defendant Joseph J. Slocum, since

about the 9th day of October, 1906, has been and now is a director of said company, and they are all citizens of the State of New York, except the defendants Delano, Gould and Jeffery; and the Wabash Railroad Company has for many years past maintained and now maintains an office in the City of New York for the transaction of the principal part of the financial business of the Company.

THIRD.—The defendant Frederic A. Delano is president of the said defendant The Wabash Railroad Company. The defendant Edward T. Jeffery is chairman of the Board of Directors of said company, which board holds its regular meetings and conducts the business of said company in the City of New York. The defendant Edgar T. Welles is vice-president of the said company; the defendant John C. Otteson is secretary and assistant treasurer of the said company.

FOURTH.—The defendants Mercantile Trust Company, the United States Mortgage and Trust Company and the Metropolitan Trust Company of the City of New York are domestic corporations duly organized by and existing under the laws of the State of New York, with their respective offices and places of business in the City of New York.

FIFTH.—The defendant Bowling Green Trust Company is a domestic corporation, duly created and organized under the laws of the State of New York, having its principal office and conducting its business at the City of New York, and the said Trust Company, together with the defendants J. C. Van Blarcom and James B. Forgan, are the trustees named and appointed in the trust deed by way of mortgage, which has been made to them as such trustees by the defendant The Wabash Railroad Company upon all its franchises and property for

the security of the payment of the principal and interest of the $200,000,000 of four per cent. bonds recently made and issued by the said Wabash Railroad Company, and hereinafter referred to. 31

SIXTH.—The defendants Henry Evans, Henry K. Pomroy and George M. Cumming are citizens of the State of New York, and are members of, and constitute a committee representing and acting for owners of the debenture mortgage bonds of the said defendant Wabash Railroad Company, which committeee is hereinafter more particularly referred to, and with the co-operation and confederation of the defendant Wabash Railroad Company published the plan set forth in Exhibit B hereto annexed; and 32
the defendants Henry Evans, Henry K. Pomroy and George M. Cumming, and each of them, have since the inception of the scheme and plan which is set forth in Exhibit B, hereto annexed, co-operated and confederated with the defendants Wabash Railroad Company and United States Mortgage and Trust Company in carrying out and accomplishing the said scheme and plan.

Upon information and belief, that the said defendants Evans, Pomroy and Cumming, constituting the committee which is above referred to, and each of them, have held and owned ever since the 15th day of August, 1906, a large amount of the debenture bonds of the defendant The Wabash 33
Railroad Company, which are hereinafter more particularly referred to, and now hold the same, unless said bonds have been deposited and exchanged under the plan set forth in Exhibit B, hereto annexed.

SEVENTH.—The defendant Wabash Railroad Company had on October 22, 1906, a capital stock issued and outstanding as follows: $24,000,000 of preferred stock and $38,000,000 of common stock, and the plaintiff is, and was, prior to the 15th day of August, 1906, the owner of one hundred thou-

sand dollars ($100,000) par value of said common stock, represented by ten certificates of one hundred shares each, said shares being each of the par value of one hundred dollars ($100), and which stock now, and prior to the 15th day of August, 1906, was and is registered and then stood and now stands in the name of this plaintiff on the books of the said company.

EIGHTH.—The said defendant Wabash Railroad Company, in or about July, 1889, created and subsequently issued debenture bonds secured by mortgage upon a part of its property, which bonds are now outstanding to the amount of $30,000,000, divided into two series: Series A, consisting of $3,500,-
000, and Series B, consisting of $26,500,000 par value. That the principal of said bonds will not mature until July, 1939. Under the terms of the said bonds and the said mortgage indenture securing the same, the interest thereon is six per cent., is payable only from and out of the net income remaining after the payment of all operating expenses, and such sums as in the judgment of the Board of Directors of said company may be necessary to maintain and renew the railroad and its appurtenances, and keep the same in good condition, and to increase its equipment to such extent as may be commensurate with its business requirements, and to pay the taxes, rentals, interest and sinking fund
instalments accruing to or to accrue on any and all mortgages existing on the said property, and to satisfy all liens and charges thereon that are or may be prior in equity to said debenture mortgage bonds; and it is further provided in said bonds and said mortgage that the said interest shall not be cumulative. No interest has ever been paid by said company on the $26,500,000 of said debenture bonds, Series B, and no interest has ever been paid upon the $3,500,000 of Series A since January, 1904.

NINTH.—That at some time during the summer of the year 1906, the exact date being unknown to

this plaintiff, negotiations were begun between the 37
defendant Wabash Railroad Company and the said defendants Henry Evans, Henry K. Pomroy and George M. Cumming, acting as the committee which is above referred to, for the purpose of agreeing upon a plan for the retirement of the said $30,000,000 of debenture mortgage bonds through the issue of other securities, both bond and stock, by the said defendant Wabash Railroad Company, and on or about the 15th day of August, 1906, after the plaintiff became a stockholder in said company, an agreement in writing was entered into by and between the said defendants Evans, Pomroy and Cumming, acting as such committee, and the defendant the Wabash Railroad Company, whereby it was 38
agreed, among other things, that in the event the stockholders and debenture mortgage bondholders should, at a meeting to be subsequently called, approve said agreement, and in the event that at least ninety-five per cent. of the holders of the debenture bonds should consent to the plan proposed in and by the said agreement, the said plan should become effective. The said agreement, among other things, provided that there should be issued by the defendant Wabash Railroad Company to the holders of each one thousand dollars ($1,000) of debenture bonds, Series A, seven hundred and seventy-five dollars ($775) par value in new four per cent. mortgage bonds. five hundred and sixty dollars 39
($560) par value in preferred stock, and five hundred and sixty dollars ($560) in common stock, and that there should be issued for each one thousand dollars ($1,000) par value of debenture mortgage bonds, Series B, seven hundred dollars ($700) par value in new bonds, five hundred dollars ($500) in preferred stock, and five hundred dollars ($500) in the common stock. The said agreement further provided that in the event no underwriting syndicate should be formed to carry out the said plan, the percentage of each class of new securities to be issued for the old debenture bonds should be in-

40 creased two per cent. on the par value of the said debenture bonds. The said agreement further provided that the said defendant The Wabash Railroad Company might elect to accept, for the purpose of carrying out the agreement, a less number of debenture bonds than ninety-five per cent. of Series B. The said agreement further provided that the committee should be reimbursed all their expenses and outlays and be paid a compensation not exceeding $60,000, by the defendant The Wabash Railroad Company.

TENTH.—Under date of August 16, 1906, the said defendants Delano and Otteson, acting respectively
41 as president and secretary of the defendant Wabash Railroad Company, by order of the Board of Directors, issued a call for a special meeting of stockholders and debenture mortgage bondholders of the said company, to be held at Toledo, Ohio, on the 22d day of October, 1906. The said meeting was called for the purpose of considering and voting and acting upon the following matters, namely:

"(1.) The creation of an issue of four per cent. fifty-year refunding mortgage gold bonds of the company to an amount not exceeding in the aggregate the principal sum of $200,000,000, to bear date July 1, 1906, with interest at the rate of four per cent. per annum, both principal and interest being
42 payable in gold coin of the United States, and to authorize the execution of a mortgage securing said bonds upon all of the railroads and properties of the company owned by it at the date of said mortgage, and thereafter acquired by the use of said bonds, or the proceeds thereof, reservation being made of a sufficient number of said bonds to refund, retire and effect the exchange of the existing mortgage bonds of the railroad company, and of all its promissory notes and equipment obligations, the remainder of said bonds to be issued only for the betterment, development, extension and equipment of the prop-

erty of the company, and for other lawful corporate purposes, as provided in the mortgage; and

(2.) The increase of the authorized preferred capital stock of the company by the amount of $16,500,000, such increase to consist of 165,000 shares of the par value of $100 each, and the increase of the authorized common capital stock of the company by the amount of $81,500,000, such increase to consist of 815,000 shares of the par value of $100 each; and

(3.) To authorize the issue of preferred and common capital stock of the company to such amounts, not exceeding, however, $16,500,000 par value of each, as may be necessary to effect the exchange hereinafter mentioned of the debenture mortgage bonds of the company; and

(4.) To authorize the exchange of debenture mortgage bonds of the company for its new bonds, hereinbefore mentioned, and its preferred and common capital stock upon terms and conditions authorized and approved by the Board of Directors; and

(5.) To authorize any and all necessary action in the premises by the Board of Directors, and by the officers of the company,

Action by the stockholders and debenture mortgage bondholders at said meeting upon all of the foregoing matters is to be dependent upon the authorization of the exchange of said debenture mortgage bonds and the exchange of the same upon the terms and conditions authorized becoming effective."

The said meeting of stockholders and debenture mortgage bondholders was held at the time and place fixed in the said notice, at which meeting the plaintiff was present by his duly authorized proxy and attorney, and after the said meeting had been

called to order and organized, and before any business was transacted, the plaintiff, by his proxy, read in the presence of all persons assembled at said meeting a notice and protest, a copy of which is hereto annexed and marked Exhibit A, and made a part of this complaint, which said notice and protest was spread upon the minutes of said meeting.

Plaintiff further alleges that his proxy duly cast plaintiff's vote against each and all of the propositions submitted to said meeting, which propositions were the same as contained in the call for said meeting hereinabove set forth, and that said negative votes were duly noted on the minutes of said meeting. A majority of the stockholders present at said meeting, and as this plaintiff is informed and believes, about ninety per cent. in amount of the outstanding debenture mortgage bondholders then present, voted to approve and to authorize the carrying out of the said plan and scheme for the retirement of the said debenture bonds, as is more particularly set forth in Exhibit B annexed hereto, but neither all the stockholders nor all of the debenture bondholders were present at the said meeting, and a large number of both stockholders and debenture bondholders have not voted in approval of the said plan and scheme, nor in any way consented to the issue of said bonds, preferred stock or common stock. That on or about the 25th day of October, 1906, the Directors of the defendant Wabash Railroad Company, at a meeting held in the City of New York, took further action with respect to the carrying out of said plan and the officers of the said defendant took proceedings to carry the same into effect, with the co-operation and confederation of the defendants Evans, Pomroy and Cumming, constituting the said bondholders' committee, and of the defendants United States Mortgage & Trust Company and Mercantile Trust Company.

ELEVENTH.—That on or about the 30th day of October, 1906, the said defendants Evans, Pomroy

and Cumming, acting as such Committee, and with the knowledge, consent and co-operation and in combination and confederation with the defendant Wabash Railroad Company, advertised in various newspapers an agreed plan for carrying out the said scheme for the exchange of the said debenture mortgage bonds of the defendant Wabash Railroad Company for new four per cent. fifty-year gold bonds and preferred and common stock of the said Company as follows, to wit: For each one thousand dollars ($1,000) par value of debenture mortgage bonds, Series A, seven hundred and ninety-five dollars ($795) of new bonds, five hundred and eighty dollars ($580) preferred stock and five hundred and eighty dollars ($580) common stock, —a total of nineteen hundred and fifty-five dollars ($1,995) of new bonds and stock for each one thousand dollars ($1,000) par value of debenture mortgage bonds, Series A, and for each one thousand dollars ($1,000) par value of debenture mortgage bonds, Series B, seven hundred and twenty dollars ($720) of new four per cent. fifty-year gold bonds, five hundred and twenty dollars ($520) of preferred stock, and five hundred and twenty dollars ($520) of common stock, a total of seventeen hundred and sixty dollars ($1,760) of new bonds and stock for each one thousand dollars ($1,000) of old bonds. A copy of the said advertisement is hereto annexed and marked Exhibit B, and made a part of this complaint.

TWELFTH.—The said plan and scheme for the issue of said new securities, bonds and stock of the defendant Wabash Railroad Company, and the contract that they should be issued and exchanged for the said debenture mortgage bonds in the proportions above stated, were made and executed, and designed and intended to be carried out, performed and executed at the City of New York, and the scheme has been in form completed and carried into effect as to more than nine-tenths of said de-

52 benture bonds by the defendant Wabash Railroad Company, its directors and officers, with the co-operation and confederation of the defendants Evans, Pomroy and Cumming, as such Committee, and of the defendants United States Mortgage and Trust Company, the Bowling Green Trust Company, Van Blarcom & Forgan, and Mercantile Trust Company, at the City of New York. The new said securities, or interim certificates therefor have been issued and the exchange has been made by the co-operation and confederation of the defendants United States Mortgage and Trust Company, Bowling Green Trust Company, Van Blarcom & Forgan with the Wabash Railroad Company and said Com-
53 mittee of Debenture Bondholders. And on information and belief plaintiff alleges that such exchanges have been made to the amount of more than ninety per cent. of said debenture bonds. The defendant Mercantile Trust Company is the registrar of the capital stock of the defendant The Wabash Railroad Company, and as such registrar countersigns the certificates for said capital stock issued, and to be issued under said plan and scheme, which stock without such registration cannot be listed on the Stock Exchange nor negotiated in the market. The defendant Mercantile Trust Company is the trustee under the mortgage securing the debenture bonds of the said Wabash Railroad Company. The
54 defendant United States Mortgage and Trust Company, by agreement with the said Committee, was and acted as the depositary named in the plan set forth in Exhibit B hereto annexed, to receive the debenture mortgage bonds from the holders thereof, and to exchange the new mortgage bonds and common and preferred stock issued therefor as stated and provided in the said contract and plan, which whole plan was and is illegal, unauthorized by law, in violation of law and *ultra vires* the said Wabash Railroad Company.

THIRTEENTH.—Art. XII., Sec. 8 of the Constitution of the State of Missouri, now and prior to August 15th, 1906, in force and effect, provides and enacts as follows: 55

"No corporation shall issue stock or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void."

Sec. 962 of the Revised Statutes of the State of Missouri, in force and effect now, and prior to the conception of the plan and scheme herein alleged, provides and enacts as follows:

"The stock and bonds of a corporation shall be 56
issued only for money paid, labor done or money or property actually received. Any corporation may increase its capital stock or its bonded indebtedness with the consent of the persons holding the larger amount in value of the stock. * * *

But the shares of stock or bonds arising from such increase shall only be disposed of for money paid, labor done or money or property actually received. All fictitious issues or increase of stock or bonds of any corporation shall be void."

By Art. XII., Sec. 10 of the Constitution of the State of Missouri, in full force and effect now, and 57
at and before the acts of the defendants with respect to the plan and scheme herein stated, as more particularly set forth in Exhibit B hereto annexed, it is provided and enacted that "No corporation shall issue preferred stock without the consent of all of the stockholders."

That by Sec. 1050 of the Revised Statutes of the State of Missouri of 1899, in full force and effect now and at and before the acts of the defendants herein stated, it is provided that before any issue of preferred stock shall be made that subject shall be submitted to the vote of the stockholders, and

58 that no such issue shall be valid unless "all the stockholders shall consent."

And the plaintiff further alleges that all the holders of the capital stock of the said Wabash Railroad Company did not consent and have not consented to the increase of the preferred stock and the issue thereof by said company, as provided to be issued and intended to be, and actually issued under the plan and scheme herein alleged, or to any increase of such preferred stock for any purpose whatsoever.

It is enacted and provided by the laws of the State of Michigan, in full force and effect now and at and before the acts of the defendants herein com-
59 plained of, that the capital stock of corporations may be paid for either in cash or in real or personal property, and if paid for in property an itemized description thereof must be annexed to the Articles of Association, together with the value of each item taken. That the defendant Wabash Railroad Company has not complied with such statute by inserting in its Articles of Association, or otherwise stating, the value of any property taken, or to be taken, for the issue of the common and preferred stock provided for in the plan and scheme hereinbefore stated.

That by Sec. 10 of Article II. of the Constitution of the State of Illinois, and Sec. 20 of Chap. 114 of
60 the Revised Statutes of said State, in full force and effect now and at and before the acts of the defendants herein stated, it is provided as follows: "No such corporation shall issue any stock or bonds, except for money, labor or property actually received and applied to the purpose for which such corporation was organized. All stock dividends and other fictitious increase in capital stock or indebtedness of any such corporation shall be void."

That while there is no statutory regulation on the subject in the State of Indiana, the common law of that State requires that capital stock of corporations shall be paid for at par either in money, or

with property at its fair value. That the said Wabash Railroad Company has not received or been paid any money or labor, nor any property within the true intent and meaning of said Constitutions and statutes above cited, or of any of them, for the said $16,500,000 common or $16,500,000 preferred stock above described, nor for the $21,862,500 of four per cent. bonds, a part of the said issue of $200,000,000, or so much of said common and preferred stock and four per cent. bonds as have been used and applied in exchange for said debenture bonds, and that the issue thereof and the exchange thereof for said debenture bonds has added nothing to the assets and property of the Wabash Railroad Company and will only largely increase its outstanding liabilities, if held to be valid. 61 62

FOURTEENTH.—The said plan of retiring the said debenture mortgage bonds hereinbefore described, by giving in exchange therefor bonds, preferred and common stock issued for said debenture bonds, is unlawful, unauthorized, contrary to the laws of the States by which the said defendant Wabash Railroad Company is organized, is *ultra vires* the corporation, and is unjust, inequitable and injurious to the plaintiff and to all other stockholders of the said company who are similarly situated in the following particulars, to wit:

It is unauthorized by, and in violation and contravention of the laws of the States respectively under which the defendant Wabash Railroad Company is incorporated, and in which States the entire system of railroads owned and operated by it is situated; and in this—that the said debenture mortgage bonds were retired by the delivery to, and exchanging with the holders thereof of nineteen hundred and fifty-five dollars ($1,955) par value of the new securities of the said Wabash Railroad Company for each one thousand dollars ($1,000) par value of bonds Series A, and of seventeen hundred and sixty dollars ($1,760) of new securities for each 63

64 one thousand dollars ($1,000) par value of bonds Series B. That the total amount of such new bonds and preferred and common stock to be issued under the said plan for the retirement of, or in exchange for, the $30,000,000 of said debenture bonds is $53,482,500 and in addition thereto $690,000 of preferred and $690,000 of common stock for the expenses of carrying out the said plan. That in said transaction the said company did not receive either money or property or any other consideration whatsoever for $33,000,000 of its capital stock, and the said capital stock, both common and preferred, so issued and used in redeeming or retiring the said debenture bonds, is what is known and called
65 watered or fictitions stock, has added nothing to the property of the company, but has increased its liabilities in the amount named and therefore is illegal and without consideration and will, by reason of the violation of the laws of said States, subject the said defendant Wabash Railroad Company to liability to the forfeiture of its charter and franchises, to the damage and injury of its stockholders. That the said plan and scheme was and is illegal and *ultra vires* the defendant The Wabash Railroad Company in this—that it increases the preferred capital stock to the amount of $16,500,000 without the consent of all the stockholders of the Wabash Railroad Company, and in direct violation of the
66 provisions of the Constitution and Statutes of several of the domiciliary States of said Wabash Railroad Company as hereinbefore alleged in that the consent of all said stockholders as hereinbefore set forth has not been given or obtained, and particularly the consent of this plaintiff; and in that the said bonds and preferred and common stock so issued and exchanged for the said debenture bonds were not and have not been and were never intended to be paid for in money, labor or property.

That the effect of said plan and scheme is to change the said non-cumulative, non-paying deben-

ture bonds, the principal of which does not become due until the year 1939, and which are secured by debenture income mortgage on only a part of the property of the said Wabash Railroad Company, into bonds with a fixed interest charge, secured by mortgage upon all the present lines of railway and property of said company, and all property to be hereafter acquired, which interest charge if not paid will subject the entire property of said company to foreclosure and its capital stock to extinguishment; to the damage and irreparable loss of plaintiff and all other stockholders of said company. 67

That the said plan places ahead of the present common stock and subordinates the same to the new issue of $16,500,000 of preferred stock in contravention of law. Dividends of seven per cent. per annum upon such new preferred stock must be paid before the common stock held by plaintiff and others may receive anything, and as the issue of such preferred stock is without consideration it dilutes that class of stock and depreciates the value and security of both the preferred and common stock outstanding at the time of the acts complained of. 68

That the issue of $16,500,000 par value of common stock without any consideration dilutes and makes less valuable the old common stock.

That the interest rate of four per cent. upon the $21,862,500 new mortgage bonds, which the defendant Wabash Railroad Company has issued or will issue under the plan hereinbefore set forth, will, during the next thirty-three years, the life of the present debenture mortgage bonds, amount to $28,858,500, without compounding, an amount nearly sufficient to retire and pay at their maturity in 1939 the $30,000,000 of outstanding debenture bonds, and that the said interest charge on the said $21,862,500 new bonds will be taken out of the revenues of the property and the property impoverished and impaired to that extent; whereas, if the said debenture bonds are allowed to remain outstanding, all 69

70 of the requirements of the said defendant Wabash Railroad Company for extensions, improvements, new equipment and other betterments may be met out of the net earnings of the said Company, with no obligation to pay interest on the said outstanding debenture mortgage bonds, unless there shall be a surplus of net earnings over and above all the requirements of the Company for the matters and purposes aforesaid.

FIFTEENTH.—That notwithstanding the proposition to issue $53,482,500 of new mortgage bonds and stock in exchange for the debenture bonds, it is proposed by the said plan to keep the said debenture
71 bonds alive as additional security for the said new mortgage bonds until all of said debenture bonds shall have been exchanged or retired.

That at none of the times herein stated have the said debenture mortgage bonds, either Series A or B, been worth nor have the same sold in the open market for their par value. That during the year 1906 the highest and lowest prices at which the Series A bonds have sold were 98 and 87½ respectively, and that on August 15, 1906, the date of the agreement between The Wabash Railroad Company and the Committee herein referred to, the Series B bonds sold at 82, and on October 22, 1906, the date of the stockholders' meeting, Series B bonds sold at
72 80½, and at about the same price on October 30, 1906, the date of the publication of the plan for exchange herein referred to, and on December 22, 1906, sold at 75, and on December 31, 1906, they sold at 74½. That the total market value of the $26,500,000 of Series B bonds at the about prices at which they have lately sold, viz., 75 cents on the dollar, is $19,875,000, while under the plan and scheme herein referred to, the said Wabash Railroad Company has issued, or will issue in exchange therefor new four per cent. bonds and preferred and common stock to the amount of $46,640,000, and for the $3,500,000 of Series A bonds, which during the year

1906 have continuously sold at less than par, and as 73
low as 87½, said Wabash Railroad Company has issued, or will issue, $6,842,500 of new four per cent. bonds and preferred and common stock. That the defendant Wabash Railroad Company, on December 22, 1906, declared operative the plan and scheme for the exchange of new bonds and stocks for the debenture mortgage bonds in this complaint and in Exhibit B hereto annexed more fully described, and a notice to that effect has been published by the defendants Evans, Pomroy & Cumming, and a further notice has been published by said Committe, dated December 31, 1906, in which it is stated that the said plan having been declared and become operative, interim certificates represent- 74
ing the new securities issued thereunder have been delivered to the United States Mortgage and Trust Company for distribution by it after that date to holders of the receipts of that Company issued upon the deposit of the debenture mortgage bonds.

On information and belief the plaintiff alleges that the new four per cent. mortgage bonds and the preferred and common stock of The Wabash Railroad Company, or interim receipts therefor, in an amount sufficient to carry the said plan and scheme into effect, so far as the same has been assented to by depositing debenture mortgage bondholders, have been delivered to the defendant United States Mortgage and Trust Company for the purpose 75
of effecting the exchange of securities pursuant to the plan and scheme hereinbefore referred to, and that interim certificates representing such bonds and preferred and common stock respectively have been delivered to said depositing bondholders in exchange for the debenture bonds so deposited by them.

SIXTEENTH.—That the annual report of the said Wabash Railroad Company for the year ending June 30, 1906, shows a surplus only of $509,332.79 which could be applicable to the payment of inter-

76 est upon the debenture mortgage bonds, which surplus is equal only to about one and seven-tenths per cent. upon the said $30,000,000 debenture bonds, but as interest would first have to be paid in full at six per cent. upon the $3,500,000 of Series A bonds, there would remain only about $300,000 applicable to interest upon the $26,500,000 Series B bonds, or about one and one-eighth per cent. (1 1/8%).

That the Directors of the defendant Wabash Railroad Company, at a meeting held on or about December 22, 1906, took action declaring in effect that there were no net earnings of said Company available for the payment of interest upon the said debenture mortgage bonds, and directing that no pay-
77 ment of interest thereon be made. That notwithstanding such action of passing and defaulting the interest on the said debenture bonds because the same had not been earned, the directors of the defendant Wabash Railroad Company authorized the payment of the coupons due January 1, 1907, on the new four per cent. mortgage bonds issued under the plan and scheme aforesaid, in exchange for the debenture bonds, and said coupon interest on the new bonds is being paid by the defendant United States Mortgage and Trust Company from funds furnished by the Wabash Railroad Company, to the holders of receipts issued by the United States Mortgage and Trust Company on the deposit of the debenture
78 bonds, and the said Wabash Railroad Company, unless restrained by order this Court, will pay the subsequently maturing instalments of interest coupons on said new four per cent. mortgage bonds.

SEVENTEENTH.—On information and belief the plaintiff alleges that the defendant George J. Gould and several of the other defendants who are directors of the Wabash Railroad Company were large holders of the debenture mortgage bonds of the Wabash Railroad Company at the time of the publication of the plan and scheme set forth in Exhibit B hereto annexed, and that they have deposited

the said bonds so owned by them with the United 79
States Mortgage and Trust Company, and have received or will receive the new bonds and preferred and common stock issued under said plan. That the defendant Metropolitan Trust Company was, at the time of the publication of the plan and scheme set forth in Exhibit B hereto, the owner and holder of $5,435,000 of said debenture mortgage bonds Series B of the defendant Wabash Railroad Company, which said bonds have been deposited with the United States Mortgage and Trust Company under the plan and scheme herein set forth, and the defendant Metropolitan Trust Company of the City of New York has received, or will receive, the new bonds and preferred and common stock, or 80
interim certificates therefor issued under the said plan and scheme. That the said defendant directors of the said Wabash Railroad Company, who were holders of such debenture bonds, the Metropolitan Trust Company of the City of New York and the said Bondholders' Committee will be unduly and inequitably benefited if the said scheme for the retirement of said debenture bonds be upheld and decreed valid.

EIGHTEENTH.—Plaintiff further alleges that by reason of the said unlawful combination, plan and agreement between said Wabash Railroad Company and said Debenture Bondholders' Committee, 81
referred to in this complaint and Exhibit B hereto annexed, there have been issued and will be placed upon the market, if the said plan, scheme and combination be not declared and adjudged invalid, a large amount of unlawful and invalid bonds and preferred and common stock of said Wabash Railroad Company, and plaintiff and other stockholders of said Company thereby affected will, as plaintiff is advised and believes, be obliged to resort to a multiplicity of suits to avoid and defeat said unlawful and invalid bonds and stock created, issued and

incurred by said Railroad Company, and said Railroad Company itself may be directed and required to observe and obey the said laws of the said several States of its being, and its own organic and fundamental laws, and be necessitated to bring and maintain, as this plaintiff is advised and believes and charges, a multiplicity of suits to avoid and escape the force and effect of said unlawful and invalid but apparent liabilities, bonds and stock by it so incurred and issued, and the said Wabash Railroad Company will on that account be put to great expense and loss by reason thereof.

NINETEENTH.—The said defendants herein named as directors or officers of the Wabash Railroad Company have been such officers and directors respectively at all the times since August 1, 1906, except defendant Slocum, who was elected a director October 9, 1906, and have acted and exercised their powers as such in ordering, assisting and participating in doing the acts and things herein alleged, to carry into effect the said plan and scheme, and are still such directors and officers respectively, in full and complete command and control of the said Wabash Railroad Company and its affairs, with interests and motives adverse to and against the institution, by the said Wabash Railroad Company, of any action or legal proceedings to obtain the relief herein demanded; and any request or demand by the plaintiff or any other stockholders that said Wabash Railroad Company commence such action or proceedings would be useless and futile. That the defendants herein, except the Metropolitan Trust Company, during all the times herein stated, have proceeded to do the acts and to carry into effect the plan and scheme herein alleged and complained of, with full notice and knowledge of plaintiff's protest against the same, and of all the objections thereto and the illegality thereof.

Wherefore, the plaintiff demands judgment against the defendants a follows: 85

I.—That the plan and scheme for the issue and delivery of fifty-year four per cent. gold mortgage bonds and the preferred and common stock of the Wabash Railroad Company in exchange for, or retirement of the debenture mortgage bonds Series A and B of said Wabash Railroad Company, as set forth in this complaint and Exhibit B hereto attached, be decreed and adjudged to be *ultra vires* the said Wabash Railroad Company, illegal and void, and that all said bonds and preferred and common stock issued and used or applied by said Wabash Railroad Company for the purposes stated in said plan and scheme be decreed and adjudged il- 86
legal, void and of no effect; and that the defendants Wabash Railroad Company, United States Mortgage and Trust Company, Bowling Green Trust Company, J. C. Van Blarcom and James B. Forgan and each of them be decreed and ordered to re-exchange and redeliver any and all of the debenture mortgage bonds of the Wabash Railroad Company, Series A and B, held by them or any of them, which have been by the owners thereof exchanged for new mortgage bonds, preferred and common stock of the Wabash Railroad Company under the plan and scheme in this complaint described, to the holders of said new four per cent. mortgage bonds, preferred and common stock, in the same proportions 87
as they were issued in exchange for the debenture mortgage bonds under said plan and scheme, to the end that the depositing debenture bondholders, or their assigns, the holders of said new bonds and preferred and common stock may be restored to their original position as holders of the debenture mortgage bonds.

II.—And in default of the relief above prayed for:

That the defendants who are officers and directors of the defendant The Wabash Railroad Com-

88 pany, to wit, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, Robert C. Clowry, George J. Gould, Winslow S. Pierce, Robert M. Gallaway, Thomas H. Hubbard, John T. Terry and Joseph J. Slocum, and each of them, and the defendant United States Mortgage and Trust Company, be adjudged and decreed to restore and return to the said Wabash Railroad Company all of the fifty-year four per cent. mortgage bonds, and all of the preferred and common stock of the defendant The Wabash Railroad Company, which have been or may hereafter be issued and used in exchange for such debenture bonds. And in the event that for any reason they shall be unable to do so, that they, and
89 each of them, be ordered and decreed to pay into the treasury of The Wabash Railroad Company the aggregate par value of such bonds and common and preferred stock so issued, and that the defendant The Mercantile Trust Company be ordered and adjudged to return and deliver to said Wabash Railroad Company all of the shares of common and preferred stock so issued which have been or may be countersigned by said Trust Company, and used in exchange for such debenture bonds, and in default of said Mercantile Trust Company being for any reason unable to do so, to pay into the treasury of the said Wabash Railroad Company the par value of such common and preferred stock so counter-
90 signed, issued and used. And in default of such relief, that the said defendants and each of them be ordered to account for and pay into the treasury of the Wabash Railroad Company so much of the par value of the said bonds and stocks so issued and exchanged for the said debenture bonds as may be found to exceed the actual market value of the said debenture bonds at the time such exchange was made.

And that the said defendant The Metropolitan Trust Company of the City of New York be ordered and adjudged to return to said Wabash Railroad Company, all of the bonds and common and pre-

ferred stock of the Wabash Railroad Company so 91
received by it in exchange for $5,435,000 of said debenture bonds, and in default of being unable for any reason to so return the said bonds and stock, that it be adjudged and decreed to pay into the treasury of the said Wabash Railroad Company so much of the par value of such bonds and preferred and common stock so received by it in exchange for the said debenture bonds as may be found to exceed the actual market value of such debenture bonds at the time the exchange was made.

III.—That pending this action, and until the final determination thereof, the defendant The Wabash 92
Railroad Company, its officers, agents, attorneys and servants, be enjoined and restrained from any further proceedings to carry into effect the said plan and scheme of exchanging its bonds, common and preferred stock for its outstanding bonds, which have not yet been deposited or exchanged in pursuance of such plan.

IV.—That pending this action, and until the final determination thereof, the defendant Wabash Railroad Company be enjoined and restrained from paying any interest upon any of its fifty-year four per cent. mortgage bonds which have been issued or may hereafter be issued in exchange for said de- 93
benture mortgage bonds under the plan and scheme in this complaint alleged and set forth, and that said defendant be further enjoined and restrained from transferring upon its books any certificates representing any of its preferred or common stock which have been, or may hereafter be issued in exchange for the debenture bonds under said plan and scheme; and that the said defendant be further enjoined and restrained from paying any dividends upon any part of its preferred stock issued in exchange for the debenture mortgage bonds under the said plan and scheme; and that the said defendant

94 Wabash Railroad Company, its officers, agents, servants and attorneys, be enjoined and restrained from receiving or counting, or permitting to be received and counted, any votes at any meeting of the stockholders of said company, on the shares of preferred and common stock issued in exchange for the said debenture mortgage bonds under said plan and scheme.

V.—That pending this action, and until the final determination thereof, the defendant Mercantile Trust Company be enjoined and restrained from countersigning as registrar any certificates repre-
95 senting the preferred or common stock of the defendant Wabash Railroad Company which have been or may be hereafter issued in further carrying out the plan and scheme in this complaint set forth, and be further enjoined and restrained from countersigning any certificates representing preferred or common stock which may be hereafter issued by the defendant Wabash Railroad Company as a reissue or transfer of the certificates for said preferred and common stock issued under said plan and scheme.

VI.—That the defendants Jeffery, Delano, Welles, Clowry, Gould, Pierce, Gallaway, Hubbard, Terry and Slocum, who are directors of the defend-
96 ant Wabash Railroad Company; and the defendant John C. Otteson, who is secretary and assistant treasurer of said corporation defendant, and each of them, be ordered to account to the said Wabash Railroad Company, and to pay into the treasury of said company all moneys which have been, or may be hereafter paid as interest upon any or all of the fifty-year four per cent. mortage bonds herein referred to, which have been or may be issued in exchange for the debenture mortgage bonds of the said Wabash Railroad Company under the plan and scheme set forth in this complaint and Exhibit B.

And that the plaintiff have such other and fur-

ther order and relief as may be equitable and 97
proper.

STEPHEN M. YEAMAN,
Attorney for Plaintiff.
Office and P. O. address,
15 William Street,
Borough of Manhattan,
New York City

STATE OF NEW YORK, }
County of New York, } ss.:

JAMES POLLITZ, being duly sworn, says: That he is the plaintiff in the above entitled action, that he has read the foregoing complaint, and that the same is true of his own knowledge, except as to the mat- 98
ters therein stated to be alleged upon information and belief; and as to those matters he believes it to be true.

JAMES POLLITZ.

Sworn to before me this 16th }
day of January, 1907. }
JOHN J. O'REILLY,
Notary Public,
Kings County.
Certificate filed in New York County.

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## Exhibit "A." 99

TO THE STOCKHOLDERS AND DEBENTURE MORTGAGE BONDHOLDERS OF THE WABASH RAILROAD COMPANY, IN SPECIAL MEETING ASSEMBLED AT TOLEDO, OHIO, OCTOBER 22, 1906, PURSUANT TO A CALL SIGNED BY THE PRESIDENT AND SECRETARY OF SAID COMPANY, DATED NEW YORK, AUGUST 16, 1906:

TAKE NOTICE:

The undersigned, the holder of one thousand shares of the common capital stock of the Wabash

100 Railroad Company, hereby protests against any action being taken at this meeting, or any adjournment thereof, by the stockholders or debenture mortgage bondholders of that Company, which attempts or purports to authorize, in any manner, or to any extent, the carrying out of the plan to issue new four per cent. fifty-year mortgage bonds and preferred and common stock of the Company, in exchange for the debenture mortgage bonds as set forth in the call for this meeting, and the explanatory circular issued by the President and Secretary of said Company under date of September 8, 1906, for the following reasons, among others:

101 1. In the circular issued by the said Company under date of September 8, 1906 ,it is proposed to issue to the holders of $30,000,000 mortgage debenture bonds, upon which interest is payable only if earned, and upon $26,500,000 of which no interest has ever been paid, $21,262,500 of the proposed new four per cent. fifty year mortgage bonds, $15,210,000 of the preferred stock and $15,210,000 of common stock, or new bonds and stock to the amount of $51,682,500 to retire the $30,000,000 of debenture bonds, and to the extent of $21,682,500 the new stock will be fictitious, without consideration and void.

102 2. The Constitution of the State of Missouri provides that capital stock can only be issued for money paid, labor done or property actually received, and that all fictitious increase of stock is void, and the laws of the other states wherein said Company is incorporated, to wit: Ohio, Indiana, Illinois, Michigan and Iowa provide that capital stock can only be issued at par for money or property at its fair value.

3. The said proposition alters the position of the present stockholders in the following respects, among othesr:

A. The changing of a non-cumulative, non-paying bond, the principal of which does not become due until 1939, into a bond with a fixed interest charge, which if not paid, will subject the property to foreclosure and the capital stock to extinguishment. 103

B. It places ahead of the present common stock $15,210,000 of preferred stock, upon which dividends of seven per cent. must be paid before the common stock may receive anything, and to the extent of $6,472,500 the proposed issue of preferred stock will be without any consideration, thus diluting that class of stock and depreciating the value of both the preferred and common stock. 104

C. It is proposed to issue $15,210,000 of common stock without consideration, thereby diluting and making less valuable the present common stock.

4. The debenture mortgage bondholders are disqualified to vote upon this proposition, which contemplates their advantage and enrichment to the injury of the present stockholders, and changing the position of the debenture mortgage bonds from a non cumulative, non-paying security to that of a foreclosable mortgage bond with a definite fixed charge.

I respectfully request that the foregoing protest be entered in full upon the minutes of this meeting, and it is herewith handed to the Secretary for that purpose. 105

JAMES POLLITZ,
By his Proxy and Attorney,
STEPHEN M. YEAMAN.

Toledo, Ohio, October 22, 1906.

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## Exhibit "B."

TO THE HOLDERS OF DEBENTURE MORTGAGE BONDS, SERIES A AND SERIES B, OF THE WABASH RAILROAD COMPANY:

The undersigned, acting as a Committee of Debenture Mortgage Bondholders, Series B of The Wabash Railroad Company, have been engaged for some time in negotiating an arrangement whereby the Railroad Company may exchange and retire its Debenture Mortgage Bonds, provide for the refunding and retirement of all of its bonded indebtedness, funded notes and equipment obligations and for the
107 capital expenditures required for the development, improvement and extension of its property to meet the requirements of its increased business and the standards of its competitors. As the result of such negotiations, the Committee has concluded an agreement with the Railroad Company embodying the following

PLAN:

The Railroad Company has authorized by action of its Stockholders and Debenture Mortgage Bondholders, at a special meeting held on October 22, 1906, the creation of an issue of refunding bonds to be known as its First Refunding and Extensions
108 Mortgage Fifty-Year Four Per Cent. Gold Bonds, to an amount not exceeding in the aggregate the principal sum of $200,000,000 at any one time outstanding, to be dated July 1, 1906, to mature July 1, 1956, and to bear interest at the rate of four per cent. per annum, payable semi-annually on the first days of January and July in each year. All of said bonds are to be secured by a mortgage, similarly authorized and approved, upon all of its railroad and property, and are to be issued for the purpose of refunding and retiring all of the present bonded indebtedness of the Railroad Company, including the exchange of its Debenture Mortgage Bonds, as

hereinafter mentioned, as well as retiring its 109
funded notes and equipment obligations, paying bonds of other companies assumed or guaranteed by it, and providing funds for the development of the railroads and properties of the Railroad Company.

The Railroad Company has also authorized the increase and issue of its preferred and common capital stock in amounts necessary to carry out and complete the exchange of its Debenture Mortgage Bonds upon the terms hereinafter mentioned.

TERMS OF EXCHANGE.

Holders of debenture mortgage bonds of the Railroad Company who shall, on or before November 30, 1906, deposit their bonds, duly assigned for transfer, with the United States Mortgage and Trust Company, at its office, No. 55 Cedar street, New York City, will receive therefor negotiable deposit receipts entitling the holders thereof to receive, upon the surrender thereof and upon the due execution of the proposed mortgage and the issue of the bonds secured thereby and upon the issue of preferred and common capital stock of the Railroad Company in such amounts as may be necessary for the purposes of the exchange, the following securities: 110

For each $1,000, par value, of Debenture Mortgage Bonds, Series A, $795, par value of new bonds, $580, par value, in preferred stock, and $580, par value, in common stock, of the Railroad Company. 111

For each $1,000, par value, of Debenture Mortgage Bonds, Series B, $720, par value, in new bonds; $520, par value, in preferred stock, and $520, par value, in common stock of the Railroad Company.

Scrip will be issued in adjustment of fractional amounts.

The new bonds will bear interest from July 1, 1906.

112 The foregoing plan of exchange is set forth in the agreement between the undersigned and the Railroad Company above mentioned, to which all bondholders depositing their bonds become parties and wherein it is provided that depositors are bound by all of the provisions and limitations therein contained. Copies of this agreement may be obtained by bondholders upon application at the office of the United States Mortgage and Trust Company, No. 55 Cedar Street, New York City.

In case at least 95 per cent. in face value of the Debenture Mortgage bonds, Series B, shall not be deposited for exchange, as aforesaid (unless the Railroad Company shall elect to accept the amount
113 of bonds which shall be so deposited as sufficient for the purpose of carrying out the exchange), then the deposited bonds are to be returned without charge upon surrender of the deposit receipts issued with respect thereof.

Upon the issue of the new bonds and preferred and common stock, the same will be delivered by the Railroad Company to the United States Mortgage and Trust Company in exchange for the Debenture Mortgage Bonds deposited with the Trust Company, which bonds shall be pledged under the new mortgage and kept alive as therein provided until the entire issue of Debenture Mortgage Bonds shall have been acquired and exchanged. The new
114 securities so received by the Trust Company will be delivered by it to the holders of its deposit receipts upon the surrender thereof.

In case the new securities, or interim certificates representing the same, shall not be issued and ready for delivery to the holders of deposit receipts on or prior to December 31, 1906, the deposited Debenture Mortgage Bonds will be returned without charge to the holders of deposit receipts upon the surrender thereof.

If the plan for the exchange of Debenture Mortgage Bonds shall become operative, all moneys heretofore received by the undersigned from holders of

Debenture Mortgage Bonds under the terms of the agreement constituting the undersigned a Committee will be returned to the persons from whom the same were received. 115

The foregoing plan was submitted at a special meeting of the Stockholders and Debenture Mortgage Bondholders of the Railroad Company held on October 22, 1906, at which meeting there was the largest representation of Debenture Mortgage Bonds and stock in the history of the Railroad Company, with only one exception (in 1892), and was duly authorized and approved, about 90 per cent. of all outstanding Debenture Mortgage Bonds voting in favor of its adoption without any dissenting votes.

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The Committee believes that the plan secures to Debenture Mortgage Bondholders a most desirable result, extending, as it does, their interest over the entire property of the Railroad Company on the basis of a fixed return upon their investment, and affording to them as Stockholders an interest in the surplus revenues of the Company, as well as in the future development and growth of the property through the application of resources provided by the new bonds.

The Committee, as well as the individual members, have agreed to deposit for exchange all Debenture Mortgage Bonds, owned or controlled by them, and recommend to Debenture Mortgage Bondholders the prompt deposit and exchange of their bonds. 117

HENRY EVANS,
HENRY K. POMROY,
GEORGE M. CUMMING,
Committee.

WILLIAM C. TRULL,
Counsel.
DAVID RUMSEY,
Secretary.

New York City, October 30, 1906.

118 **C.**

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

JAMES POLLITZ,
Plaintiff,

vs.

THE WABASH RAILROAD COMPANY, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, John C. Otteson, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, George J. Gould, Winslow S. Pierce, John T. Terry, Joseph J. Slocum, Mercantile Trust Company, United States Mortgage and Trust Company, Henry Evans, Henry K. Pomroy, George M. Cumming, The Bowling Green Trust Company, J. C. Van Blarcom, James B. Forgan and The Metropolitan Trust Company of the City of New York,
Defendants.

Petition of defendant The Wabash Railroad Company to remove this cause into the Circuit Court of the United States for the Southern District of New York.

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The petition of The Wabash Railroad Company, one of the defendants in the above entitled action, respectfully shows to this Honorable Court:

That this action was commenced against this petitioner by the service of summons and complaint

therein on the 23d day of January, 1907, by delivery 121
of the same within the County of New York, to John C. Otteson, the secretary of this petitioner;

That said action is of a civil nature in equity and that the said James Pollitz is the sole plaintiff therein;

That said plaintiff was at the time of the commencement of said action in this court and still is a citizen of the State of New York; and that your petitioner was at the time of the commencement of said action in this court and still is a consolidated railroad corporation duly incorporated, organized and existing under and by virtue of the laws of the States of Ohio, Michigan, Indiana, Illinois and Missouri, and is a citizen of the State of Ohio, and is 122
not a citizen or resident of the State of New York;

That said plaintiff in his complaint herein claims, in substance, that this petitioner, during the summer of the year 1906, entered into certain negotiations for the purpose of agreeing upon a plan for the retirement of the debenture mortgage bonds of this petitioner through the issue of other securities, both bonds and stock, and that the plan covered by such agreement was subsequently authorized and approved by the stockholders and debenture mortgage bondholders of this petitioner at a special meeting held at Toledo, Ohio, on October 22, 1906, in pursuance of published notice, at which meeting the issue of certain new bonds and preferred and 123
common stock of this petitioner and the exchange of certain of said new bonds, preferred and common stock of this petitioner for its debenture mortgage bonds was authorized and approved;

That said plan of exchange was thereafter made public through the publication of the notice, copy of which is attached to the complaint herein and marked "Exhibit B";

That said plan of exchange is unlawful, unauthorized, contrary to the laws of the States in which this petitioner was organized, is *ultra vires* and unjust, inequitable and injurious to the plaintiff, who

124 claims to be the owner of one thousand shares of the common capital stock of this petitioner;

That the new bonds and the preferred and common stock of this petitioner, or interim receipts therefor, in an amount sufficient to carry the said plan into effect, so far as the same has been assented to by debenture mortgage bondholders, have been delivered to the depositing bondholders in exchange for the debenture bonds deposited by them; and that by reason thereof there have been issued and will be placed upon the market, if the said plan be not declared and adjudged invalid, a large amount of unlawful and invalid bonds and preferred and common stock of this petitioner;

125 That the plaintiff, in his complaint herein, demands that the plan and scheme for the issue and delivery of the new bonds and the preferred and common stock of this petitioner in exchange for or retirement of its debenture mortgage bonds be decreed and adjudged to be *ultra vires*, illegal and void; and that all said bonds and preferred and common stock issued and used or applied by this petitioner for the purposes stated in said plan and scheme be decreed and adjudged illegal, void and of no effect; and further, that pending this action and until the final determination thereof, this petitioner, its officers, agents, attorneys and servants, be enjoined and restrained from taking any further pro-
126 ceedings to carry into effect the said plan and from paying any interest upon any of its new bonds which have been issued thereunder, and from transferring upon its books any certificates representing any of its preferred or common stock issued under said plan and from paying any dividends upon any part of its preferred stock issued under said plan and from permitting to be received and counted any votes with reference to the shares of preferred and common stock so issued at any meeting of the stockholders of this petitioner.

That the plaintiff, in his complaint alleges that the defendants Edward T. Jeffery, Frederic A.

Delano, Edgar T. Welles, Robert C. Clowry, 127
George J. Gould, Winslow S. Pierce, Robert M. Gallaway, Thomas H. Hubbard and John T. Terry are directors, and constitute a majority of the Board of Directors of this petitioner; that the defendant Edward T. Jeffery is chairman of the Board of Directors of this petitioner; that the defendant Frederic A. Delano is president, the defendant Edgar T. Welles is vice-president, and the defendant John C. Otteson is secretary and assistant treasurer of this petitioner.

Said complaint also alleges that the defendant the Mercantile Trust Company is the registrar of the capital stock of this petitioner, and that said stock cannot be listed without registration or nego- 128
tiated in the market; that said defendant is also the trustee under the mortgage securing the debenture bonds of this petitioner.

Said complaint also alleges that the defendant United States Mortgage and Trust Company was and acted as the depositary named in the plan set forth in the published notice, copy of which marked Exhibit B is annexed to said complaint.

Said complaint also alleges that the defendants, Henry Evans, Henry K. Pomroy and George M. Cumming, are members of and constitute a committee representing owners of debenture mortgage bonds of this petitioner, which committee has co-operated and confederated with this petitioner and 129
with the defendant United States Mortgage and Trust Company in carrying out and accomplishing the said plan, and has published the notice set forth in Exhibit B annexed to said complaint.

That the defendants Bowling Green Trust Company, J. C. Van Blarcom and James B. Forgan, are the trustees named in the mortgage made to them by this petitioner to secure the new bonds issued in exchange for debenture mortgage bonds under said plan.

Said complaint also alleges that the said plan for the exchange of said debenture mortgage bonds of

130 this petitioner has been completed and carried into effect as to more than nine-tenths of said debenture mortgage bonds by this petitioner, its directors and officers, with the co-operation and confederation of the defendants Evans, Pomroy and Cumming, as a committee, and of the defendants United States Mortgage and Trust Company, Bowling Green Trust Company, J. C. Van Blarcom and Forgan, and The Mercantile Trust Company; and that the new securities, or interim certificates therefor, have been issued and the exchange has been made by the co-operation and confederation of the defendants United States Mortgage and Trust Company, Bowling Green Trust Company, Van Blarcom and For-
131 gan, with this petitioner and said committee.

Said complaint further alleges upon information and belief, that such exchanges have been made to the amount of more than ninety per cent. of said debenture bonds.

Said complaint also alleges on information and belief, that certain of the defendants, who are directors of this petttioner, were large holders of debenture mortgage bonds, and that The Metropolitan Trust Company was the owner and holder of $5,435,000 of said debenture mortgage bonds, and that said directors and said Metropolitan Trust Company will be unduly and inequitably benefited if the plan for the retirement of said debenture
132 mortgage bonds be upheld and decreed valid.

That the plaintiff in his complaint herein demands, as an alternative relief to the main relief prayed for by him against this petitioner and in default of said main relief and in case the Court shall hold and decree that he is not entitled to said main relief, to have an accounting by the defendants who are officers and directors of The Wabash Railroad Company and by the defendant United States Mortgage and Trust Company and the defendant The Mercantile Trust Company in respect to the new bonds and common and preferred stock

of this petitioner which have been issued under said 133
plan of exchange;

That your petitioner disputes the claim against it as set forth by the plaintiff in his complaint, and denies that the plaintiff is entitled to the judgment and relief prayed for against this petitioner or to any judgment or relief against it; and this petitioner alleges that the fundamental and primary controversy, as set forth in said complaint, is whether or not the plan for the exchange of the debenture mortgage bonds by this petitioner, the authorization and creation by it of the new securities in the said complaint set forth and the issue of the same by it for the purpose of carrying said plan into effect is, as alleged in said complaint, illegal, unlawful, void 134
and prohibited by the charter of this petitioner and the laws under which it is incorporated; and whether said new securities are, as alleged in said complaint, invalid and void; and that such controversy is a separable and distinct controversy between the plaintiff and this petitioner;

That a complete determination of said controversy can be had without the presence of any of the defendants in this action other than this petitioner; and that all of said other defendants are neither indispensable nor necessary parties to the complete determination of said controversy.

That the foregoing controversy, which is solely between the plaintiff and the petitioner, must be determined before any other controversy alleged in the 135
complaint can be considered and determined; and that said controversy between the plaintiff and this petitioner, as above set forth, is separate and distinct from any other or further controversy;

That said fundamental and primary controversy herein between the plaintiff and this petitioner is a controversy wholly between citizens of different States—to wit: Between the plaintiff, a citizen of

136 the State of New York, and this petitioner, a citizen of the State of Ohio.

That the matter in dispute in this action exceeds the sum of two thousand dollars, exclusive of interest and costs.

Your petitioner further shows that this petition is made and filed before this petitioner is required by the laws of the State of New York or the rule of this Honorable Court to answer or plead to the complaint of the plaintiff, and that it is desired by your petitioner, one of the defendants herein, to remove said cause from this Honorable Court to the Circuit Court of the United States for the Southern District of New York in accordance with the provisions of
137 the Acts of Congress of the United States in that behalf made and provided:

That no special bail was or is required in said action.

Your petitioner files and offers herein a a bond with good and sufficient security in the penal sum of $500, conditioned as required by the Act of Congress in that behalf made and provided, for entry in the Circuit Court of the United States for the Southern District of New York, on the first day of its next session, a copy of the record in this suit, and to pay all costs that may be awarded in said Circuit Court of the United States if said Court shall hold that this suit was wrongfully or improperly removed
138 thereto.

Your petitioner further prays that the said bond may be accepted as good and sufficient, and that this Honorable Court will make this order for the removal of this suit into the Circuit Court of the United States, to be held in and for the Southern District of New York, in which district this suit is pending, pursuant to the Act of Congress in such case made and provided, and cause the record herein to be removed into the said Circuit Court of the

United States, and that no further or other pro- 139
ceedings may be had in said cause in this court.

And your petitioner will ever pray.

Dated New York, January 25, 1907.

PIERCE & GREER,
Attys. for the Deft. The Wabash Railroad Company.
Office and P. O. address,
120 Broadway,
Borough of Manhattan,
New York City.

STATE OF NEW YORK, }
County of New York, } ss.: 140

JOHN C. OTTESON, being duly sworn, deposes and says that he is the secretary of the defendant The Wabash Railroad Company; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein said to be alleged on information and belief, and that as to those matters he believes it to be true.

JOHN C. OTTESON.

Sworn to before me this 25th }
day of January, 1907. }

CHARLES J. HOEHNLE,
[SEAL.] Notary Public,
Kings County. 141
Certificate filed in New York Co.

142

## D.

KNOW ALL MEN BY THESE PRESENTS, that we, the Wabash Railroad Company, as principal, and American Surety Company of New York, of 100 Broadway, New York, as surety, are held and firmly bound unto James Pollitz in the sum of five hundred ($500) dollars to be paid to the said James Pollitz, executors, administrators or assigns; to which payment well and truly to be made and done, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

143 Sealed with our seals the 24th day of January, A. D., 1907.

WHEREAS, the above bounden The Wabash Railroad Company has petitioned the Supreme Court of New York County, State of New York, for the removal of a cause pending wherein James Pollitz is plaintiff, and the Wabash Railroad Company *et al.* are defendants, to the Circuit Court of the United States for the Southern District of New York, pursuant to the provisions of the Acts of Congress in that behalf;

144 NOW, THEREFORE, the condition of the above obligation is such, that if the above bounden The Wabash Railroad Company shall enter in such Circuit Court, on the first day of its next session, a copy of the record in such suit, copies of the process against petitioner, and of all the pleadings, depositions, testimony and other proceedings in the cause, and shall pay all costs that may be awarded by said Circuit Court, if said Court shall hold that such suit was wrongfully or improperly

removed thereto, then this obligation shall be null 145
and void, otherwise of force.

THE WABASH RAILROAD COMPANY,
By E. T. JEFFERY,
[SEAL.] Chairman of the Board.
AMERICAN SURETY COMPANY OF NEW YORK,
By LEWIS B. REED,
Vice-President.
CORTLANDT S. VAN RENSSELAER,
[L. S.] Attorney.

In the presence of
JOHN C. RONALDSON,
THOMAS J. SAVAGE.

STATE OF NEW YORK, } 146
County of New York, } ss.:

On the 24th day of January, in the year 1907, before me personally came E. T. Jeffery, to me known, who being by me duly sworn, did depose and say: that he resided in New York City; that he is the Chairman of the Board of The Wabash Railroad Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

S. D. FRICKE, 147
[SEAL.] Notary Public,
New York County.

City and County of New York, ss.:

I, CORTLANDT S. VAN RENSSELAER, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and

148 true transcript therefrom, and of the whole of said original resolution.

Given under my hand, and the seal of the company at the City of New York, this 24th day of January, 1907.

CORTLANDT S. VAN RENSSELAER,
[L. S.] Attorney.

State, City and County of New York, ss.:

On this 24th day of January, 1907, before me personally appeared Lewis B. Reed, Vice-President of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in the City of New
149 York; that he is the Vice-President of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said Lewis B. Reed further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the attorneys of said corporation; that the signature of said Cort-
150 landt S. Van Rensselaer subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S. Van Rensselaer and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him the said Lewis B. Reed, Vice-President.

MARSHALL L. BROWER,
[L. S.] Notary Public,
New York County.
Certificate filed in all Counties.

**E.** 151

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES POLLITZ,
Plaintiff,

vs.

THE WABASH RAILROAD COMPANY, Edward T. Jeffery, Frederic A. Delano, Edgar T. 152
Welles, John C. Otteson, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, George J. Gould, Winslow S. Pierce, John T. Terry, Joseph J. Slocum, Mercantile Trust Company, United States Mortgage and Trust Company, Henry Evans, Henry K. Pomroy, George M. Cumming, The Bowling Green Trust Company, J. C. Van Blarcom, James B. Forgan and the Metropolitan 153
Trust Company of the City of New York,
Defendants.

Please to take notice that on the complaint and petition and bond for removal in this action, and on the affidavit of James Pollitz, a copy of which is hereto annexed, I shall move this Honorable Court, at a term thereof appointed to be held for the purpose of hearing motions, on the 15th day of Febru-

154 ary, 1907, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for an order to remand the above entitled cause to the Supreme Court of the State of New York, in and for the County of New York, in the City of New York, from whence it came, upon the following grounds:

1. That the record in the said cause does not present a case removable from the State Court to this Court under the statute governing such cases.

2. That the record in the said cause does not present a separable controversy in contemplation of the act authorizing the removal of causes.

155 3. The requisite diverse citizenship required as a condition precedent to the jurisdiction of this Court in a controversy of the character presented by this record does not exist.

4. This Court would not have had, and has not now, any jurisdiction over the parties to this suit by reason of the absence of diverse citizenship, and of the fact that several of the defendants, who are necessary defendants to this action, are citizens of the same State with the plaintiff.

5. That the petition and bond to remove this cause, and each of them, are defective and insuf-
156 ficient to effect a removal of the whole case, in that they are each of them executed by one defendant only.

6. That the petition is defective and insufficient in that it misstates the nature and character of this cause, and in that it states that the sole primary character of this action, as disclosed by the said complaint, is to decree and adjudge to be *ultra vires*, illegal and void the scheme for the issue of certain securities, to decree to be illegal, void and of no effect all of the bonds and preferred and common stock issued, used or applied by the defendant

Wabash Railroad Company, for the purposes which 157
are set forth in the complaint in this action, and pending this action, to restrain and enjoin the said defendant, its officers, agents, servants and attorneys from taking any further proceedings to carry into effect the plan referred to in the complaint, and from paying any interest upon any of its new bonds which have been issued thereunder, and from transferring upon its books any certificates representing any of its preferred and common stock issued under said plan, and from paying any dividends upon any part of its preferred stock issued under said plan, and from permitting to be received and counted any votes with reference to the shares of preferred and common stock so issued; whereas, in fact, 158
the primary and fundamental purpose of this cause is also stated in the said complaint to be to decree and order the defendants United States Mortgage and Trust Company, Bowling Green Trust Company, J. C. Van Blarcom and James B. Forgan, and each of them, to re-exchange and re-deliver any and all of the debenture mortgage bonds of the Wabash Railroad Company, Series A and B, held by them, or any of them, which have been by the owners thereof exchanged for new mortgage bonds, preferred and common stock of said Wabash Railroad Company under the plan and scheme which is described in the complaint, to holders of the new four per cent. mortgage bonds, preferred and com- 159
mon stock, in the same proportions as they were issued in exchange for debenture mortgage bonds under said plan and scheme, to the end that the depositing bondholders, or their assigns, the holders of said new bonds and preferred and common stock, may be restored to their original position as holders of the debenture mortgage bonds; and also to decree and order the defendants Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, Robert C. Clowry, Robert M. Gallaway, George J. Gould, Winslow S. Pierce, Thomas H. Hubbard, John T. Terry and Joseph Slocum, and each of them, and

160 the defendant United States Mortgage and Trust Company, to restore and return to the defendant Wabash Railroad Company all of the said fifty-year four per cent. bonds, and all of the preferred and common stock of the defendant Wabash Railroad Company which have been, or may hereafter be issued and used in exchange for such debenture bonds; and also in the event that, for any reason, said last named defendants shall be unable to do so, that they and each of them be ordered and decreed to pay into the treasury of the Wabash Railroad Company the aggregate par value of such bonds and common and preferred stock so issued; and also to order and decree the Mercantile Trust Company
161 to return and deliver to said Wabash Railroad Company all of the shares of common and preferred stock so issued, which have been or may be countersigned by said Mercantile Trust Company and used in exchange for such debenture bonds, and in default of such Trust Company being, for any reason, unable to do so, that it be ordered and decreed to pay into the treasury of The Wabash Railroad Company the par value of such common and preferred stock so countersigned and used; and in default of the relief which is above referred to, that the said defendants and each of them be ordered to account for and pay into the treasury of The Wabash Railroad Company, so much of the par
162 value of the said bonds and stocks so issued and exchanged for the said debenture bonds as may be found to exceed the actual market value of the said debenture bonds at the time such exchange was made; and also to decree and order the return by the defendant Metropolitan Trust Company of the City of New York to the Wabash Railroad Company of all of the bonds and common and preferred stock of said Wabash Railroad Company so received by it in exchange for $5,435,000 of said debenture bonds; and in default of being able for any reason so to return the said bonds and stocks, that said Metropolitan Trust Company of the City of New

York be adjudged and decreed to pay into the treasury of said Wabash Railroad Company so much of the par value of said bonds and preferred and common stock so received by it in exchange for said debenture bonds as may be found to exceed the market value of such debenture bonds at the time the exchange was made; and that the plaintiff cannot have adequate relief in the premises, or any relief whatsoever in this action, as against the said United States Mortgage and Trust Company, the Mercantile Trust Company, the Bowling Green Trust Company, the Metropolitan Trust Company, or against the individual defendants herein, or any of them, without joining all of said defendants in this action. 163 164

7. That the defendants, the United States Mortgage and Trust Company, the Mercantile Trust Company, the Bowling Green Trust Company, and the Metropolitan Trust Company of the City of New York, are all corporations organized by, and existing under the laws of the State of New York, and are citizens of the State of New York, and the plaintiff and many of the individual defendants who are named in the complaint in this cause, either as officers and directors of the said Wabash Railroad Company, or otherwise, are citizens of the said State of New York, and residents of the Southern District of New York, and that this Court cannot acquire jurisdiction over any of the said defendants who are such citizens and residents for the purpose of rendering any judgment herein. 165

8. That the bond given upon the removal of this cause is insufficient, in that it is executed only by the defendant, The Wabash Railroad Company.

9. And for other reasons which are apparent upon the face of the record, and to be assigned upon the argument of this motion.

166 10. And for such other and further relief as may be proper.

Dated New York, February 6, 1907.

Yours, &c.,

STEPHEN M. YEAMAN,
Solicitor for Plaintiff.
Office and P. O. address,
15 William Street,
New York City.

To Messrs. PIERCE & GREER,
Solicitors for Defendant The Wabash Railroad Company,
167 120 Broadway, New York.

Messrs. ALEXANDER & GREEN,
Solicitors for Deft. Mercantile Trust Company,
120 Broadway, New York City.

Messrs. DAVIES, STONE & AUERBACH,
Solicitors for Deft. United States Mtge. & Trust Company,
32 Nassau Street, New York City.

Messrs. PARSONS, CLOSSON & MCILVAINE,
Solicitors for Deft. Metropolitan Trust Co.,
52 William Street, New York.

DAVID RUMSEY, Esq.,
168 Solicitor for Deft. Evans, Pomroy & Cumming,
26 Liberty Street, N. Y.

Messrs. THOMPSON, VANDERPOEL & FREEDMAN,
Solicitors for Deft. Bowling Green Trust Co.,
2 Wall Street, New York.

**F.** 169

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES POLLITZ,
Plaintiff,

vs.

THE WABASH RAILROAD COMPANY, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, John C. Otteson, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, Winslow S. Pierce, George J. Gould, John T. Terry, Joseph J. Slocum, Mercantile Trust Company, Henry Evans, Henry K. Pomroy, George M. Cumming, The Bowling Green Trust Company, J. C. Van Blarcom, James B. Forgan and the Metropolitan Trust Company of the City of New York, 170 171

Defendants.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

JAMES POLLITZ, being duly sworn, says that he is the plaintiff in the above entitled cause. That this cause was originally brought in the Supreme Court of the State of New York, in the County of New

172 York, and was removed to this Court on the sole motion and application of the defendant The Wabash Railroad Company, on the 25th day of January, 1907.

The defendant Wabash Railroad Company is a corporation incorporated under the laws of the State of Ohio, and of several other States, and has an office for the transaction of business in the City of New York. That the defendants United States Mortgage and Trust Company, Mercantile Trust Company, Bowling Green Trust Company and the Metropolitan Trust Company of the City of New York, are corporations created by, and existing under the laws of the State of New York, and that each of said de-
173 fendants is located and doing business in the City of New York, and is a citizen of the State of New York.

Upon information and belief, that the defendants Edgar T. Welles, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, Winslow S. Pierce, Henry Evans, Henry K. Pomroy and George M. Cumming, and each of them is a citizen of the State of New York, residing in the Southern District of New York.

That the ground of my information, and the source of my belief as to the residence of each of said defendants, is the fact that each of said defendants is stated in Trow's Directory of the City of
174 New York to be a resident of the Borough of Manhattan, in the City of New York.

That the complaint and exhibits thereto annexed show that the act of registering and exchanging the securities referred to in the complaint herein, and sought to be prevented, are to be done and performed in the City of New York by direction of the officers of the defendant, the Wabash Railroad Company, residing in the City of New York; and the said Mercantile Trust Company is the agent selected by said Wabash Railroad Company for the registration of its new issue of stock; and the de-

fendant United States Mortgage and Trust Company 175
is the agent selected by said Wabash Railroad Company and the committee of the debenture bondholders for accomplishing the delivery and exchange of the securities named in the complaint, and the Bowling Green Trust Company is, together with the defendants J. C. Van Blarcom and James B. Forgan, one of the trustees named and appointed in the trust deed by way of mortgage, which has been made to them as such trustees by the defendant The Wabash Railroad Company, upon all its franchises and property for the security of the payment of the principal and interest of the $200,000,000 of four per cent. bonds which are referred to in the complaint herein; and the defendant the Metropolitan 176
Trust Company of the City of New York was, at the time of the publication of the plan and scheme which is set forth in Exhibit B which is annexed to the complaint herein, the owner and holder of $5,435,000 of the debenture mortgage bonds Series B, which are referred to in the complaint, which said bonds have been deposited with the United States Mortgage and Trust Company under the plan and scheme in the complaint referred to, and the defendant Metropolitan Trust Company of the City of New York has received, or will receive, new bonds and preferred and common stock, or interim certificates therefor, under the said plan and scheme.

JAMES POLLITZ.

Sworn to before me this 6th ) 177
day of February, 1907. )

CHAS. H. TOPPING,
[SEAL.] Notary Public,
New York County.

178 **G.**

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES POLLITZ

vs.

THE WABASH RAILROAD COMPANY and others.

179

**Motion to Remand to the State Court.**

LACOMBE, *Circuit Judge:*

Plaintiff is a stockholder of the Wabash Railroad Company. Among the obligations of that company are two Series (A and B) of debenture bonds due in 1939. A plan has recently been proposed for retiring these bonds, by issuing and exchanging for them a certain amount of new four per cent. mortgage bonds and new preferred and new common stock. A stockholders' meeting was called in October last to consider the plan and a majority of
180 those present voted in favor of it, and for the issuance of the new bonds and stock necessary to carry out its provisions. At the same time ninety per cent. of the debenture holders voted in favor of the exchange. The complaint alleges that the plan has been carried out as to more than nine-tenths of the debenture bonds and new bonds and stock to the requisite amount have been issued.

The complaint sets forth the provisions of various State constitutions and statutes and avers that the "whole plan was and is illegal, unauthorized by law, in violation of law and *ultra vires*," and that

the bonds and stock issued pursuant thereto are unlawful and invalid. The complaint prays that the plan "be decreed and adjudged to be *ultra vires*," and that "all said bonds and preferred and common stock issued and used or applied by said Wabash Railroad Company for the purposes stated in said plan and scheme be decreed and adjudged illegal, void and of no effect." 181

The Wabash Railroad Company is a non-resident and removed the cause on the ground that there is a separable controversy between it and the plaintiff to which the other defendants (mostly residents of this State) are not necessary parties. These additional parties are (1) the individual directors, (2) the Trust Company which is the registrar of stock of the railroad company, (3) the committee which represents the debenture holders in carrying out the plan, (4) the Trust Company in which debentures are to be deposited pending exchange, (5) the trustees named in the mortgage to secure the new four per cent. bonds, and (6) a single individual holder of debenture bonds. 182

It is manifest that complainant can obtain complete relief without the presence of these additional parties. When he shall, by action against the Wabash Company, have established the proposition that the new bonds and stock are void, he need not concern himself with the re-exchange of such as may have been delivered; they will not constitute valid obligations against the railroad, and therefore will not affect the value of his stock. Individual holders of such of the new securities as have been issued may be allowed to intervene at the discretion of the Court, but their presence is not essential to the determination of the fundamental issues raised by the complaint. It is difficult to escape the conviction that these additional "parties" have been brought into the case with the sole purpose of preventing, if possible, the removal of the cause. 183

The motion to remand is denied.

184 **H.**

At a Stated Term of the Circuit Court of the United States in and for the Southern District of New York, held at the United States Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 21st day of February, 1907.

Present—Hon. E. HENRY LACOMBE,
*Circuit Judge.*

JAMES POLLITZ,
Plaintiff,

185

vs.

THE WABASH RAILROAD COMPANY, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, John C. Otteson, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, George J. Gould, Winslow S. Pierce, John T. Terry, Joseph J. Slocum, Mercantile Trust Company, United States Mortgage and Trust
186 Company, Henry Evans, Henry K. Pomroy, George M. Cumming, The Bowling Green Trust Company, J. C. Van Blarcom, James B. Forgan and The Metropolitan Trust Company of the City of New York,
Defendants.

This suit having been commenced in the New York Supreme Court in and for the County of New

York, and having been removed to this Court upon 187
the petition of the above named defendant The Wabash Railroad Company, and the plaintiff herein having moved to remand this suit to the New York Supreme Court in and for the County of New York from which it came, and said motion having come on regularly to be heard, and Stephen M. Yeaman, Esq., of counsel for the plaintiff, having appeared in support of said motion, and Rush Taggart, Esq., of counsel for the above named defendant The Wabash Railroad Company, having appeared in opposition to said motion, and the same having been fully considered and the opinion of this Court having been delivered, it is now, in accordance with said opinion, 188

Ordered, that said motion be and the same is hereby denied.

Enter.

E. HENRY LACOMBE,
Circuit Judge.

# FILE COPY.

# No. 16 Original.

## Supreme Court of the United States.

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
FILED.
MAR 27 1907
JAMES H. McKENNEY,
CLERK

[ORIGINAL]

IN THE MATTER

*of*

THE APPLICATION OF JAMES POLLITZ FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE E. HENRY LACOMBE, CIRCUIT JUDGE OF THE UNITED STATES FOR THE SECOND CIRCUIT AND FOR THE SOUTHERN DISTRICT OF NEW YORK, AND AGAINST THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

## Brief in Support of Motion for Leave to File Petition and for Rule.

ROGER FOSTER,
*Attorney for* JAMES POLLITZ,
35 Wall Street,
New York.

# In the Supreme Court of the United States,

OCTOBER TERM, 1906.

(ORIGINAL.)

IN THE MATTER

OF

The Application of JAMES POLLITZ for a Writ of Mandamus against the Honorable E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit, and against the Circuit Court of the United States for the Southern District of New York.

**BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION AND FOR RULE.**

## Statement.

This is an application for leave to file a petition for the writ of peremptory mandamus and for an order to show cause why such a writ should not be issued commanding Honorable E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit, and commanding the Circuit Court of the United States for the Southern District of New York: to re-

mand a cause which has been removed to said Court from the Supreme Court of the State of New York because of an alleged separable controversy charged to exist between the plaintiff, a citizen of New York, and the Wabash Railroad Company, a corporation consolidated and created under the laws of Missouri, Ohio, Indiana, Michigan and Illinois. Nearly all the other defendants are citizens of the State of New York. The action was brought in the Supreme Court of the State of New York by a stockholder of the defendant railroad company. The complaint seeks to set aside and enjoin the continuance of the performance of an unlawful agreement prejudicial to the stockholders, providing for the exchange by the holders of debenture income bonds, the interest payable upon which is not cumulative, for an allotment of new stock, common and preferred, and of new mortgage bonds, of the defendant railroad company. It alleges in substance as follows: An agreement, against complainant's protest, for such exchange of securities has been made between the corporation, through a board of directors, those in control of which are themselves debenture bondholders, and by a committee which represents all the debenture bondholders. This was ratified by nine-tenths of such bondholders (pp. 13–16). A large number of these bonds have already been exchanged for *ad interim* certificates and receipts (p. 18). The new bonds and stock certificates have been executed and given to the defendant the U. S. Mortgage and Trust Company, to make the exchange (p. 25). Some of the new bonds have already been exchanged (p. 27). Interest, not due or payable by the terms of the debenture bonds, has been paid upon the new bonds issued in exchange; and unless an injunction is granted, such interest will continue to be paid upon the new bonds to those allotted them under the unlawful contract (p. 26). The principal relief prayed is a re-exchange and cancellation of the new securities (p. 29). In the alternative, there

is a prayer that the directors, the depositary of the new bonds, the registrar of the new stock, and certain bondholders, pay to the railroad company the value of such of the new securities as cannot be restored (p. 30). As subsidiary relief, complainant prays for an injunction against the continuance of the exchange, against the payment of interest upon the new bonds, and against the transfer of the new stock upon the books of the railroad company, and for an accounting by the directors for the sums already paid for unlawful interest (pp. 31, 32).

The defendants are the Wabash Railroad Company, a consolidated corporation under the laws of Illinois, Ohio, Indiana, Michigan and Missouri (p. 9); a committee of the debenture bondholders (p. 11); several individual holders of the same, including the Metropolitan Trust Company, of New York (pp. 26, 27), and several of the directors of the Wabash Railroad Company (p. 26); the depositary of the new and old securities, the United States Mortgage and Trust Company, of New York, which has the duty of making the exchange (p. 18); the three trustees under the new mortgage, among them the Bowling Green Trust Company, a New York corporation (p. 10), and the Mercantile Trust Company, also of New York, which is the registrar of the new stock certificates (p. 18). All of these, except the Wabash, a few of the directors, Messrs. Gould of New Jersey, Delano and Jeffery of Illinois, and Van Blarcom of Missouri, and Forgan, of Illinois, the trustees under the new mortgage, are citizens of New York. And so is the plaintiff (p. 23).

## POINT I.

**The Circuit Court of the United States had no original jurisdiction of the case; since the presence of all the defendants was indispensable to an adjudication concerning any part of the relief prayed against the Wabash Railroad Company.**

There can be no right to the removal of the case of a controversy, of which that Court could not have taken original jurisdiction.

*Ex parte Wisner*, 203 U. S., 51.

## POINT II.

**There can be no separable controversy where all the parties are indispensable to the determination of the matters in dispute between the plaintiff and the defendant, who seeks a removal.**

There can be no removal, when an indispensable party to the controversy is a citizen of the same State as any party on the side opposite to him. When the removal is because there are two controversies, the case must be separable into parts, so that in one of them a controversy will be presented wholly between citizens of different States, which can be fully determined without the presence of the other parties.

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Where defendants are interested in separate parts of the same subject matter, no separable controversy is presented.

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**The trustees of the new mortgage, the issue of bonds under which is attacked, and probably some other representatives of the bondholders, by whom the complaint prays that a re-exchange may be compelled of whatever has been exchanged, and that a further exchange may be enjoined; the depositary of the new securities; the registrar of the new stock, and the directors charged with fraud, are all indispensable parties to the relief here sought.**

This is not a suit to prevent the execution of an unlawful contract. It is one to prevent the further performance of a contract already executed and partially performed. The parties who, if the contract is valid, have a right to the new securities, *which some of them have received* (p. 27), have, undoubtedly a right to be heard in any suit to declare those securities void, and to set them aside. No adjudication of such a character can properly be made unless they are present or represented. Their right to a hearing cannot be left to the discretion of the Court below, should they pray leave to intervene. The plaintiff, in order to avoid a multiplicity of suits, also has the right to compel them to set up in this case any defenses that they may have. He has the further right to join those agents of the scheme and fellow conspirators, such as the depositary for exchange, and the registrar, who will not be bound by an injunction against the railroad company, and who may consummate the unlawful scheme while he is litigating with the latter.

In *Brown* v. *Trousdale*, 138 U. S., 389, a suit was brought in the State Court to declare invalid a whole issue of county bonds. A large number of the bondholders resided in the State, two of whom were made defendants. The plaintiff alleged ignorance as to who the other bondholders were, and asked that notice be given to them to come in and defend. Two bondholders, non-residents of the State, were allowed to intervene as parties defendant and to defend. Two of the resident bondholders who were made original parties declined to resist the plaintiff's claim, and answered that they had no defense. The two non-resident bondholders removed the cause to the Circuit Court upon the ground of a separable controversy between them and the county; but although there was diverse citizenship, this Supreme Court held that there was no separable controversy, and that the decree below should be reversed, and the cause remanded to the State Court.

The Bowling Green Trust Company, Van Blarcom and Forgan, who are trustees under the new mortgage, the bonds of which are to be exchanged for the debenture bonds, and the committee of the debenture bondholders, are indispensable parties to any suit to set aside the contract for the exchange, and to enjoin its continued performance.

It is well settled that every party to a contract is a necessary party in a suit to set it aside, or unless its performance would amount to a nuisance to enjoin a person from bringing it into effect.

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*a.* Since both the debenture bondholders and the holders of the new bonds are numerous, it is absolutely indispensable that some one should be made a party to protect their interests. The trustee of the mortgage is, consequently, an indispensable party. *Ribon* v. *Railroad Cos.*, 16 Wall, 446; *Wenger* v. *Chicago & E. R. Co.*, C. C. A., 114 Fed. R., 34.

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The trustee of an active trust is always an indispensable party. *Knapp* v. *Railroad Co.*, 20 Wall., 117; *Rust* v. *Britol Silver Co.*, C. C. A., 58 Fed. R., 611; *Tell* v. *Walker*, Fed. Cas. No. 13,812; *Thair* v. *Life Association of America*, 112 U. S., 717; *Pepper* v. *Fordysche*, 119 U. S., 469.

*b.* The registrar of the stock, the Mercantile Trust Company, and the United States Mortgage and Trust Company, which is the depositary of the new bonds, are also indispensable parties.

It is well settled that a stake holder in the possession of property is an indispensable party to a suit affecting the same. *Wilson* v. *Oswego Tp.*, 151 U. S., 56; *Massachusetts & S. Constr. Co.* v. *Cane Creek Tp.*, 155 U. S., 283; *Scoutt* v. *Keck*, C. C. A., 73 Fed., 900.

*c.* It has been held that there is no separable controversy, when different defendants are charged, as here, with having joined in a conspiracy to cloud the complainants' title and to defraud them of their property. *Little* v. *Giles*, 118 U. S., 596.

Nor, when an injunction is sought, as here, to enjoin the defendants from the pertormance of acts directly

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Whenever actual participation in a fraud is charged against a director, or a personal liability is sought to be imposed upon him, he is an indispensable party to the suit. *Fox* v. Mackay, 60 Fed. R., 4; *Seddon* v. *Virginia, T. & C. S. & I. Co.*, 36 Fed. R., 6; 1 L. R. A., 108.

## POINT IV.

### Mandamus is the proper remedy.

It would be a needless waste of the time of the Court below to reserve a decision upon this vital point of jurisdiction until after a final hearing on the merits.

*Ex parte Wisner*, 203 U. S., 51.

## POINT V.

**It is respectfully submitted: that leave should be granted to file the petition; and that a rule should be entered, directing the Honorable E. Henry Lacombe, United States Circuit Judge for the Second Circuit, and the Circuit Court of the United States for the Southern District of New York, to show cause why there should not issue a writ of mandamus compelling them, and each of them, to remand to the Supreme Court of the State of New York for the County of New York the suit brought by James Pollitz, as plaintiff, against The Wabash Railroad Company, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, John C. Otteson, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, George J. Gould, Winslow S. Pierce, John T. Terry, Joseph J. Slocum, Mercantile Trust Company, United States Mortgage and Trust Company, Henry Evans, Henry K. Pomroy, George M. Cumming, The Bowling Green Trust Company, J. C. Van Blarcom, James B. Forgan and The Metropolitan Trust Company of the City of New York, as defendants.**

ROGER FOSTER,
of Counsel for Petitioner.

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JAMES H. McKENNEY,

# Supreme Court of the United States.

OCTOBER TERM, 1906.

[ORIGINAL—No. 16]

IN THE MATTER

of

THE APPLICATION OF JAMES POLLITZ FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE E. HENRY LACOMBE, CIRCUIT JUDGE OF THE UNITED STATES FOR THE SECOND CIRCUIT AND FOR THE SOUTHERN DISTRICT OF NEW YORK, AND AGAINST THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

## Brief in Support of Motion for Petition for Peremptory Writ of Mandamus.

ROGER FOSTER,
*Counsel for* JAMES POLLITZ, *Petitioner*,
35 Wall Street,
New York.

# In the Supreme Court of the United States,

OCTOBER TERM, 1906.

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**BRIEF IN SUPPORT OF PETITION FOR PEREMPTORY WRIT OF MANDAMUS.**

## Statement.

This is a hearing upon the return of a rule, which has been duly served, directing Judge Lacombe, of the Second Circuit, to show cause why a writ of peremptory mandamus should not be issued, commanding him to remand a cause which has been removed to the Circuit Court of the United States for the Southern District of New York, because of an alleged sep-

arable controversy charged to exist between the plaintiff, a citizen of New York, and the Wabash Railroad Company, a corporation consolidated and created under the laws of Missouri, Ohio, Indiana, Michigan and Illinois. Nearly all the other defendants are citizens of the State of New York. The action was brought in the Supreme Court of the State of New York by a stockholder of the defendant railroad company. The complaint seeks to set aside and enjoin the continuance of the performance of an unlawful agreement prejudicial to the stockholders, providing for the exchange by the holders of debenture income bonds, the interest payable upon which is not cumulative, for an allotment of new stock, common and preferred, and of new mortgage bonds, of the defendant railroad company. It alleges in substance as follows: An agreement, against complainant's protest, for such exchange of securities has been made between the corporation, through a board of directors, those in control of which are themselves debenture bondholders, and by a committee which represents all the debenture bondholders. This was ratified by nine-tenths of such bondholders (pp. 13-16). A large number of these bonds have already been exchanged for *ad interim* certificates and receipts (p. 18). The new bonds and stock certificates have been executed and given to the defendant, the U. S. Mortgage and Trust Company, to make the exchange (p. 25). Some of the new bonds have already been exchanged (p. 27). Interest, not due or payable by the terms of the debenture bonds, has been paid upon the new bonds issued in exchange; and unless an injunction is granted, such interest will continue to be paid upon the new bonds to those allotted them under the unlawful contract (p. 26). The principal relief prayed is a re-exchange and cancellation of the new securities (p. 29). In the alternative, there

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(*e*) *The following cases were not printed in our former brief:*

In *Minnesota* v. *Northern Securities Co.,* 184 U. S., 199, 245, 246; the object of the bill was to prevent the Northern Securities Co. from making any use of the stock, or from voting any of the capital stock, and from exercising any control over two railroad companies, who were not parties to the suit. It was held, that those railroad companies, were indispensable parties to the controversy.

This Court said, speaking through Mr. Justice Shiras:

"Can such a controversy be determined with due "regard to the interests of all concerned, by a suit "solely between the State of Minnesota and the "Northern Securities Company? It is, indeed, "alleged that all of the stockholders of the North-

"ern Securities Company are stockholders in the "two railroad companies, and, therefore, it may "be said that the latter stockholders are sufficiently "represented in the litigation by the Northern Se- "curities Company; but it is not alleged that the "stockholders of the Northern Securities Company "constitute or are composed of all the stockhold- "ers of the two railroad companies, and, in fact, "the contrary is conceded in the allegations of the "bill that a majority only of the stock of one, or "perhaps both of the two railroad companies is "owned, or at least controlled and managed, by the "Northern Securities Company. It is obvious, there- "fore, that the rights of the minority stockholders "of the two railroad companies are not represented "by the Northern Securities Company. They have "a right to be represented, in the controversy, by "the companies whose stock they hold, and their "rights ought not to be affected without a hearing, "even if it were conceded that a majority of the "stock in such companies, held by a few persons, "had assisted in forming some sort of an illegal "arrangement. Moreover, it must not be over- "looked that it is not the private interests of stock- "holders that are to be alone considered. The di- "rectors of the Great Northern and Northern Paci- "fic Railway Companies are appointed to repre- "sent and protect not merely the private and pe- "cuniary interests of the stockholders, but the "rights of the public at large, which is deeply con- "cerned in the proper and advantageous manage- "ment of these public highways. It is not sufficient "to say that the Attorney General, or the Governor, "or even the Legislature of the State, can be con- "clusively deemed to represent the public interests "in such a controversy as that presented by the bill. "Even a State, when it voluntarily becomes a com- "plainant in a court of equity, cannot claim to rep- "resent both sides of the controversy. Not only "have the stockholders, be they few or many, a "right to be heard, through the officers and di- "rectors whom they have legally selected to rep- "resent them, but the general interests of the pub- "lic, which might be deeply affected by the decree "of the court, are entitled to be heard; and that, "when the State is the complainant, and in a case

"like the present, can only be affected by the pres-
"ence of the railroad companies as parties de-
"fendant.

"Upon investigation it might turn out that the
"allegations of the bill are well founded, and that
"the State is entitled to relief, or it might turn
"out that there is no intention or design on the
"part of the railroad companies to form any com-
"bination in disregard of the policy of the State,
"but that what is proposed is consistent with that
"policy and advantageous to the communities af-
"fected. But, in making such investigation, a
"court of equity must insist that both sides of the
"controversy shall be adequately represented and
"fully heard."

In *Wilder* v. *Virginia, T. & C., Steel & Iron Co.*, 46 Fed. R., 676, 677, decided by Mr. Chief Justice Fuller, *the headnote* reads as follows:

"Some of the stockholders and creditors of a New
"Jersey corporation, part of whom were citizens
"of Virginia, brought an action in a Virginia State
"court against the corporation and its promoters,
"who owned the majority of its stock, alleging that
"the latter had defrauded the corporation in the
"payment of their subscriptions, and that they had
"wasted the funds of the New Jersey corporation
"in acquiring the stock of various Virginia corpora-
"tions contrary to complainants' rights. The Vir-
"ginia corporations were also joined as defendants,
"and the theory of the bill was that complainants
"had the right to have the entire assets of the New
"Jersey corporation brought into court, and, to
"that end, that the various Virginia corporations,
"which had secured its funds, should also be wound
"up. *Held*, that incidental averments of indebt-
"edness of the New Jersey corporations to the credi-
"tors who had joined as complainants in the bill
"did not constitute a separate controversy between
"them and the New Jersey corporation, so as to en-
"title the latter to remove the cause into a federal
"court on the ground that such complainants were
"citizens of a State different from that of the cor-
"poration."

"Allegations in the bill that one of the Virginia "corporations was organized by the promoters of "the New Jersey corporation, with intent to de- "fraud the stockholders of the latter, and that the "New Jersey corporation had fraudulently con- "veyed land to the Virginia corporation without any "valuable consideration, and at a great loss, do not "constitute a separate controversy between com- "plainants and the New Jersey corporation, so as "to entitle the latter to remove the cause into a "federal court, since the Virginia corporation and "the promoters of the New Jersey corporation, "some of whom are citizens of the same State with "complainants, are indispensible parties defend- "ant."

*Cape Girardeau & S. L. R. R.* v. *Winston*, 4 Cent. Law J., 127, Fed. Cas. No. 2,390, decided by Dillon and Treat, *JJ.:*

"In a suit brought in the State court by the plain- "tiff corporation to set aside a deed of trust, made "by its officers and another corporation of the same "State, a removal of the cause to the United States "court was sought by the surviving trustee in the "deed of trust and one of the bondholders under "it. *Held* that, the latter corporation being a nec- "essary party, and no final or effectual determina- "tion of the case made by the bill being possible "without its presence, the petitioners could not "have the cause removed under the act of 1866 "(Rev. St. Sec. 693, cl. 2), as to them."

In *Anderson* v. *Bowers*, 40 Fed. R., 708, 709, an action was brought against the county officers and bondholders, to cancel the bonds and to enjoin the cancellation of a tax levied for their payment. It was *held*, that the controversy between the plaintiffs and the bondholders was not separable from that between him and the county officers.

Shiras, *J.:*

"Viewed with relation to the county of- "ficials and the bondsholders, I do not think a sep- "arable controversy exists. As against the "county officials, the remedy sought is a de-

"cree declaring the tax void. and restraining its "collection, but the ground alleged therefor is the "illegality of the bonds. As against the bondhold- "ers, the remedy sought is a decree declaring the "bonds void, and restraining their collection, on "the same ground of illegality in the issu- "ance thereof. The decision of the one question "of the validity of the bonds held by the Orient "Insurance Company decides alike the question "whether the county officials should be restrained "from collecting the tax, and the question whether "the bonds shall be decreed to be void. It cannot, "therefore, be held that the bill presents a con- "troversy against the Orient Company, touching "the bonds owned by it, separable from the con- "troversy, touching the same bonds, presented by "the bill viewed in relation to the county officials."

To the same effect is *Anderson* v. *Orient Fire Ins. Co.*, 88 Iowa, 579; 55 N. W., 348.

*Hanover Nat. Bank* v. *Credits Commutation Co.*, 118 Fed. R., 110:

"A suit in equity by stockholders against the cor- "poration, its directors and another stockholder, "who owns a majority of the stock, to enjoin the "defendants from making certain dispositions and "uses of the property and assets of the corporation, "does not involve a separable controversy between "complainants and the defendant stockholder which "gives the latter the right to remove the cause into "a federal court on the ground of diversity of citi- "zenship, where complainants and the corporation "are citizens of the same State."

See also *Shumway* v. *Chicago & I. R. Co.*, 4 Fed R., 385.

In *Douglas* v. *Richmond & D. R. Co.*, 106 N. C., 65, 10 S. E., 1048;

Plaintiffs were citizens of North Carolina, and stockholders in the defendant the N. Railroad Company, a corporation of that state. Defendant the R. Railroad Company was a Virginia corporation. Plaintiffs alleged that the N. Company issued

to the R. Company a majority of its stock, and certain bonds as security for work to be performed by the R. Company; that the R. Company had not performed its agreement, and that its debt had been paid; that the R. Company elects the officers and controls all the actions of the N. Company. Plaintiffs sought to have defendants account for the N. Company's property, and to have the stock and bonds held by the R. Company surrendered. Both companies denied the rights and allegations of plaintiffs. *Held,* that the N. Company was a necessary party defendant, and that it was not a "controversy wholly between citizens of states," or one which could be fully determined between them, if it should be divided between the state and federal courts, within 24 Stat. 553, c. 373, § 2.

That a depositary is an indispensable party to a suit affecting the title to the deposit is held in *Bailey* v. *New York Savings Bank,* 18 Blatchf., 77, 2 Fed. R., 14; *Security Co.* v. *Pratt,* 64 Fed. R., 405.

To a stockholder's action to recover dividends received by the holders of stock in another company from that in which the plaintiff was interested, which these defendant corporations had fraudulently received from the plaintiff; it was held that there was no separable controversy between the complainant and the individual defendants. *Burke* v. *Flood,* 6 Sawyer, 220, 1 Fed. R., 541.

To a stockholder's suit to set aside a lease by his company to another, and to enjoin his directors from unlawful acts in connection with the same; it was held that the directors were indispensable parties to the controversy. *Mills* v. *Central R. Co.,* 20 Fed. R., 449, 451:

"In this case the suit is against the Central Rail-
"road Company and a number of individuals, some
"of whom are citizens of the same State with the
"complainants, and others are citizens of different

"States, and specific relief is prayed against the "acts of the corporation and of the individuals "who are made defendants. Even if the theory "should be adopted that the New Jersey Central "Railroad Company is the real complainant, some "of the defendants against whom relief is sought "are citizens of the same State, and they are indis- "pensable parties, if the complainants are to have "determined the questions raised in the pleadings, "and to have extended to them the full measure "of relief which they pray for."

To a similar effect are the decisions in *Oakes* v. *Yonah Land & Mining Co.*, 89 Fed. R., 243; *Hanover National Bank* v. *Credits Commutation Co.*, 118 Fed. R., 110; *MacGinniss* v. *Boston & Montana Consolidated Copper & Silver Mining Co.*, 55 C. C. A., 648, 119 Fed. R., 96.

A case precisely analogous to the one at bar is *Campbell* v. *Milliken*, 119 Fed. R., 981:

"Various charges are made of misconduct on the "part of the natural persons, defendants in the bill, "Milliken and Hill, that they have taken funds of "the corporation, and applied them to their own "use. The purpose of the bill is to have these de- "fendants account to the corporation for moneys "so taken. In addition to this, it is charged that "these natural persons have called a meeting of the "corporation to be held on Monday next, and the "purpose is at that meeting to cause the property "of the company to be conveyed to a new company "organized in the territory of Arizona. And for "the purpose of preventing the accomplishment of "any such purpose as that, and the further diver- "sion of funds of the corporation to their own use, "the bill asks that they may be enjoined from hold- "ing the meeting, and from conveying the property, "and also asks that a receiver may be appointed."

*Held*, that there was no controversy between the plaintiffs, who were stockholders, and their corporation, separable from that between him and the defendant officers, and that the corporation could not remove the case.

Had the Wabash been a New York corporation, and the defendants against whom an accounting is prayed been citizens of another State, and had they petitioned for a removal; a question might have arisen which is not in the present case.

## POINT IV.

### The remand was not denied because of the pendency of any other suit in the Federal Court; and had that been so, it would have been no justification for the removal.

(*a*) Neither the opinion of Judge Lacombe, nor his order, nor the petition for the removal, makes any reference to any previous suit in the Federal Court, as an alleged ground for the removal. The respondents are bound by the record below. They cannot ask this Court to take judicial notice of papers below that are not recited in the order.

Were it otherwise, the Courts would be liable to be misled by garbled statements of the contents of their records, not verified by affidavit, nor by the certification of the clerk.

*Thornton* v. *Carson,* 7 Cranch, 596; *Pennsylvania Co.* v. *Bender,* 148 U. S., 255; *Rout* v. *Ninde,* 118 Ind., 123, 20 N. E., 704; *Magee* v. *Hartzell,* 7 Kan. App., 489, 54 Pac. 129; *Dours* v. *Cazentre,* McGloin (La.), 251; *Stockbridge* v. *Fahnestock,* 87 Md. 127; 39 Atl., 95; *Scott* v. *Scott,* 17 Md., 78; *Cherry* v. *Baker,* 17 Md., 75; *Lyon* v. *Boilvin,* 7 Ill., 629.

Even the Court below could not have taken judicial notice of its records in another suit for the purpose of sustaining jurisdiction here.

*In re Manderson* (C. C. A), 51 Fed. R., 501.

(*b*) Were the record of the suit, to which the respondents referred, to be examined, it would be found to be entirely different from that which is the subject of the present review, and that the present case in no respect could be deemed ancillary to the same.

(*c*) Even, however, were the suit below ancillary to one previously brought, of which there is no suggestion in the pleading or the record, still that would constitute no ground for the removal.

In *Gilmore* v. *Herrick,* 93 Fed. R., 525; Judge Taft said:

"There is no language in any removal act which "justifies the removal of a cause from a State Court "to a Federal Court, on the ground that it is an- "cillary to a suit in a Federal Court."

To the same effect are *Ray* v. *Pierce,* 81 Fed., 881; *Pitkin* v. *Cowen,* 91 Fed. R., 599; *State Trust Co.* v. *Kansas City, P. & G. R. Co.,* 110 Fed., 10.

In *Peoples Bank* v. *Calhoun,* 102 U. S., 256; the defendants had consented to the removal of the suit, which was ancillary to one previously brought. This Court consequently *held* that, the suit having been brought by consent into the Federal Court, which might originally have taken jurisdiction of it as ancillary, it made no difference how it came there; whether by removal, or by original process, or by appearance *gratis;* and that the jurisdiction should be sustained. This is entirely different from an application for a removal, which is opposed by the plaintiff.

## POINT V.

### Mandamus is the proper remedy.

It would be a needless waste of time of the Court below to reserve a decision upon this vital point of jurisdiction until after a final hearing on the merits.

*Ex parte Wisner,* 203 U. S., 51.

## POINT VI.

**It is respectfully submitted: that the peremptory writ of mandamus should issue, directing the Honorable E. Henry Lacombe, United States Circuit Judge for the Second Circuit, and the Circuit Court of the United States for the Southern District of New York, and each of them, to remand to the Supreme Court of the State of New York for the County of New York the suit brought by James Pollitz, as plaintiff, against The Wabash Railroad Company, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, John C. Otteson, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, George J. Gould, Winslow S. Pierce, John T. Terry, Joseph J. Slocum, Mercantile Trust Company, United States Mortgage and Trust**

**Company, Henry Evans, Henry K. Pomroy, George M. Cumming, The Bowling Green Trust Company, J. C. Van Blarcom, James B. Forgan and The Metropolitan Trust Company of the City of New York, as defendants.**

ROGER FOSTER,
Of Counsel for Petitioner.

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FILED.
APR 8 1907
JAMES H. McKENNE
CL

# Supreme Court of the United States.

OCTOBER TERM, 1906.

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No. 16.

(ORIGINAL.)

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## IN THE MATTER

OF

THE APPLICATION OF JAMES POLLITZ FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE E. HENRY LACOMBE, CIRCUIT JUDGE OF THE UNITED STATES FOR THE SECOND CIRCUIT AND AGAINST THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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**Return of E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit, and the Circuit Court of the United States for the Southern District of New York.**

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C. G. Burgoyne, Walker and Centre Street, N. Y.

# In the Supreme Court of the United States.

IN THE MATTER

OF

The Application of JAMES POLLITZ for a Writ of Mandamus against the HONORABLE E. HENRY LACOMBE, Circuit Judge of the United States for the Second Circuit, and against the CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

**Return of E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit, and the Circuit Court of the United States for the Southern District of New York.**

TO THE HONORABLE MELVILLE W. FULLER, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES :

Answering the rule granted by this Honorable Court on March 25, 1907, directing E. HENRY LACOMBE, Circuit Judge of the United States for the Second Circuit, and the Circuit Court of the

United States for the Southern District of New York, to show cause on April 8, 1907, why the prayer of said petition for a writ of *mandamus* commanding the remand of a certain cause to the Supreme Court of the State of New York in and for the County of New York should not be granted, the respondent begs leave respectfully to state as follows:

1. That the repondent made and entered the order referred to in the petition of the petitioner denying the motion of the petitioner to remand said cause to the Supreme Court of the State of New York in and for the County of New York, in the exercise of the jurisdiction and judicial discretion conferred upon the respondent by law and for the reasons expressed in the opinion filed therewith; and

2. That the respondent submits to the judgment of this Honorable Court and respectfully refers to the brief of Rush Taggart, Esq., and Lawrence Greer, Esq., officers of this Court, which will be filed in this cause, and the authorities therein referred to, to show cause why the writ of *mandamus* should not issue.

New York, April 5, 1907.

E. HENRY LACOMBE,
Circuit Judge of the United States
for the Second Circuit.